

JOURNAL
OF THE
SOCIETY OF COMPARATIVE
LEGISLATION

EDITED FOR THE SOCIETY BY
SIR JOHN MACDONELL, C.B., LL.D.,
AND
EDWARD MANSON, Esq.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τὰ τ'ὀρθῶς ἔχον ὁφθῇ καὶ τὸ
χρήσιμον."—ARIST. *Pol.* II. I.

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[Contributed by DR. W. R. BISSCHOP.]

THE eminent lawyer whose portrait adorns the first page of this volume, and who has succeeded in distinguishing himself in a threefold capacity, as an advocate, a politician, and a judge, may be styled a true South African and child of the country in which he was born. He received his entire education in Cape Colony, and never came to Europe to "finish" that education, as was the case with so many of his contemporaries who have since placed their mark upon the history of South Africa. In so far as his legal studies were never conducted on the accepted classical lines by the teachers of law of his time, Sir James may be considered a self-made man in the legal world of South Africa. His self-teaching may have assisted him in preserving originality of thought; it certainly accounts for his great fidelity to the historic institutions of the South African soil and the legal principles which that continent inherited from the great jurists of Rome and the Dutch Republic.

As a lawyer, Sir James has always shown himself a staunch defender of the Roman-Dutch law principles; as a politician, a warm supporter of a native policy which, for its broad-mindedness, is generally considered as going too far in the eyes of South African politicians of the day. No doubt we may trace in this the influence of his education by his father, Mr. J. Rose Innes, C.M.G., who was a Resident Magistrate in various parts of Cape Colony, and at one time Under Secretary for Native Affairs.

Born on January 8, 1855, at Grahamstown, the future Chief Justice was successively educated at Uitenhage and Bedford, where his school companions were, among others, Sir William Solomon, now with him a member of the Appellate Division of the Supreme Court of South Africa; Sir Richard Solomon, now High Commissioner in London for the Union of South Africa; Mr. W. P. Schreiner, now member of South Africa's Senate; Mr. J. W. Leonard, the late leader of the Transvaal Bar; and Mr. W. O. Danckwerts, K.C. Afterwards he studied at Gill College at Somerset East (where his father had been appointed Resident Magistrate) and obtained his B.A. degree at the University of Cape Town. He was then appointed clerk on the staff of the Standard Bank at Somerset East.

Banking business was, however, only a means to an end. Mr. Innes' mind was set upon a legal career, and during the hours when the bank did not

lay claim to his services, he continued with the assiduity which has marked all his endeavours the legal studies which he had commenced immediately on his obtaining the B.A. degree. These studies he pursued unaided. When he found that office work and office hours interfered too much with them, he went to Cape Town, in order to give all his time and energy to preparation for call to the Bar, receiving some assistance from Mr. Twentymen Jones, afterwards for several years Puisne Judge of the Supreme Court of the Cape Colony.

Mr. Innes was called to the Bar on February 12, 1878, and was appointed Queen's Counsel on May 21, 1890.

Of his career as an advocate a contemporary gave the following description :

Painstaking, patient, and laborious, he worked up every case thoroughly both as to the law and as to the facts. Fluent of speech, never wearying the Court, he was listened to with attention and respect. Thoroughly honest and fair in his representation of facts, as well as his quotations of law, his word was trusted and taken without further proof being required. From the commencement of his career at the Bar Mr. Innes made it a rule (one which the late Sir Charles Brand and the late F. S. Watermeyer and a few others had followed) not only to work up the law of the case on his own side, but also in anticipation of what the other side might have to say and quote, so as to meet his opponent's arguments at once in reply.¹

Mr. Innes' ambitions carried him further. It was not long before he entered the political arena, and there, as in his forensic career, he showed his ability, assiduity, and seriousness of purpose.

As a member of the Cape Legislative Assembly, first for Somerset East and afterwards for Cape Town, he took a specially prominent position with regard to natives and native policy. When, in the golden days of Rhodes' rising genius, Mr. Innes, K.C., was asked and consented to join Rhodes' Cabinet in 1900 as Attorney-General, he seized the opportunity of passing through Parliament, though not without difficulty, an Act prohibiting the sale of intoxicating liquors to natives, which since has become known as "Innes' Liquor Act." Opportunity failed him for further legislative endeavours in favour of the natives, for in 1893 he seceded from the Rhodes Ministry, together with Mr. Merriman and Mr. Sauer, for reasons which have since become part of the political history of South Africa, and he returned to his private practice, which he had abandoned while Attorney-General.

During his tenure of office as Attorney-General he had also, among other measures, succeeded in embodying the English company law in the Cape Companies Act, 1892.

During the following turbulent years of South African history Mr. Innes did not play an active rôle in South African politics. When he went to Pretoria in 1896 to attend the trial of the Reform Committee prisoners, he held a watching brief on behalf of the British Government. It was not until

¹ *South African Law Journal*, 1892, p. 2.

June 1900, after the fall of Mr. W. P. Schreiner's Cabinet, that Mr. Innes again took office and accepted the Attorney-Generalship in Spriggs' fourth Ministry. This time again his tenure of office was of short duration, and when it came to an end, eighteen months afterwards, his short but honourable political career closed. In the meantime—on the occasion of the present King's (then Duke of York's) visit to South Africa in 1901—he had been created K.C.M.G.

As soon as, at the end of the South African war, it was decided to discontinue the Military Courts in the Transvaal, and to reintroduce the Civil Courts, Sir James was asked to accept the Chief Justiceship, which he did. On April 12, 1902, Sir James changed the Attorney-General's wig and gown for the robes of a Chief Justice, as, before him, had been done by the present Lord de Villiers of Wynberg; and he took his seat on the Bench of the High Court of the Transvaal. After the Peace of Vereeniging, Sir James was, in June 1902, appointed Chief Justice of the Transvaal Colony.

During the eight years of his judgeship at the head of the Transvaal Bench Sir James displayed the same characteristics as he had done in his forensic and political work. Painstaking, patient, and upright, he showed himself not only a good judge, but especially ambitious to uphold the traditions of that Bench, so ably laid down by his predecessors, Chief Justices Kotzé and Gregorowski, to maintain the Roman-Dutch law as the common law of South Africa, irrespective of influences from outside which threatened to clash with its faithful interpretation and true development along the lines historically laid down. In doing this he was able to rely on his great store of knowledge of Roman law, and on the assistance of his able colleague and former school-fellow, Sir William Solomon, and of Mr. Justice Wessels. His well-known decision in *Rood v. Wallach*, among others, bears testimony to his aversion to adopting doctrines which are entirely foreign to the Roman-Dutch law, and which, if admitted, would of necessity destroy its character and hamper its development along lines of its own.

Thus he placed his mark on his judicial career, and showed himself fully qualified for the duties which recently have been placed on his shoulders. In 1909 the so much desired Union of South Africa became an accomplished fact. Together with the Union, in the South Africa Act, 1909, a permanent Court of Appeal was created for the four provinces of the Union as an Appellate Division to the Supreme Court of South Africa, hitherto fulfilled by the Judicial Committee of the Privy Council, to consist of the Chief Justice of South Africa, two ordinary and two additional judges of Appeal, with its seat at Bloemfontein in the Orange Free State.

Therewith the foundation has been laid for the creation of uniformity of law in South Africa which was so much desired. It augurs well for the continuance of South Africa's common law that the task of creating that uniformity has been entrusted to men who have so long been prominent

as staunch supporters of the supremacy of Roman-Dutch law. Lord de Villiers, Sir William Solomon, and Sir James Rose Innes, since June 4, 1910—when this Court of Appeal was inaugurated—its three permanent members, are so many guarantees for the true interpretation of Roman-Dutch legal doctrines—not the least Sir James, who has so assiduously maintained the principles of Roman-Dutch law in their integrity.

Sir James when a member of the Cape Bar, married Miss Pringle, of the Bedford district, in Cape Colony.

THE INTERNATIONAL LAW ASSOCIATION CONFERENCE: A SURVEY.

[Contributed by LORD ALVERSTONE L.J.C.]

THE Conference of the International Law Association recently held in London has again brought out in strong relief the great importance of unification of private International Law so far as it affects commercial matters. Some of the papers, however, have directed attention to other branches of law in which the study of the systems of different civilised nations may be of great value to the community at large.

The deliberations and discussions at the recent Conference deserve more than a passing notice, if for no other reason at least with the object of directing attention to branches of the law of civilised nations which well repay comparison and justify attempts at unification. It is no part of this notice to refer to the past work of the International Law Association; that topic was sufficiently dealt with in the admirable address of the President, Lord Justice Kennedy. Founded in 1873 by a few enthusiasts in the cause of codification of the law, it passed in its earlier years through what may not unfairly be described as a somewhat cold and benevolent patronage. Its work, however, during the last twenty years has more than justified the expectations of its founders, and the character of the papers read at the last Congress, both from the point of view of study and of practical value, not only showed a marked advance over the earlier communications to the Association, but also demonstrated the value of such conferences as giving the lawyers of different nations the opportunity of considering the systems which prevail among their civilised neighbours.

The number and variety of the subjects dealt with at the recent Conference render impossible any attempt to review the subjects discussed in detail, or to suggest any concrete conclusions as the result of the discussions. The following lines are only written in order to direct attention to certain salient features which have not hitherto received much consideration on the part of those expert in the study of private International Law.

One chord of sadness must be struck in referring to the recent death of Mr. Justice Walton. Practically the last work that he did was to prepare a paper on *The Limits of State Interference with Maritime Contracts*, which he only completed a few hours before it was read at the meeting of the Association on the afternoon of Wednesday, August 3.

The interesting communication upon the subject of International Arbitration contributed by Dr. Evans Darby was in fact the continuation of many other previous contributions of a like kind, showing the increased and increasing acceptance by civilised nations of the practice of submitting to international arbitration differences which arise between them. It is worthy of note that the period of fifteen years has seen fulfilled and brought into practical recognition the hopes and aspirations of many who discussed the subject of international arbitration during the earlier years of the Association. The question of the establishment of an International Court was the subject of lengthy discussion at Brussels in the year 1893, when many of the arrangements actually in existence to-day at The Hague were regarded as a counsel of perfection almost beyond the expectations of then living men. In the present atmosphere of national emulation it is not possible to suggest that the increasing popularity of international arbitration has conduced to the reduction of armaments, but probably the seed so sown will bear fruit, and those who come afterwards may see the dawn of that universal peace in the hope of which the founders of the International Law Association so earnestly and ardently laboured.

The discussion of the Declaration of London—the outcome of the International Conference in the year 1909—should be of the highest value in directing the attention of the civilised world to the complicated questions raised by that Declaration. It is needless to say that the paper of Mr. Arthur Cohen, who was Counsel for Great Britain in the Geneva Arbitration in the year 1872, directed attention in a masterly way to the leading questions which are involved in the Declaration. The view of Sir John Macdonell, himself a great expert, may be regarded by some as being too optimistic, but on the other hand it is a very valuable contribution to the consideration of the question, and directs attention to certain points in regard to which further developments may be properly considered. One cannot leave the subject without calling attention to the justice of many of the criticisms embodied in the very able paper of Dr. Baty.

The papers upon the subject of compensation to workmen were of very high value, both from the historic and practical points of view. It is quite impossible to discuss the details of the very interesting contributions of Sir John Gray Hill and Dr. Mignault, but a consideration of these papers, and the discussion which followed them, cannot fail to raise in many minds a doubt as to whether this and other civilised countries have not gone too far in the direction of protecting workmen, and whether it would not have been better to have acted upon the principle, adopted in some other countries, of a system of universal assurance against accidents of all kinds, to which the workmen, as well as the masters, should contribute. There is ground to fear that the result of recent legislation has been to render more difficult the obtainment of employment by the older as compared with the younger workmen.

The discussion upon the papers read upon the interference of the State in matters of contract will always be connected with the memory of the late Mr. Justice Walton, who, as already stated, prepared specially upon that subject a paper read before the Congress, in which he dealt, with his usual lucidity, with the different grounds upon which interference by Governments might be justified. This paper, and that of Mr. Stephens upon the Harter Act, brought out in relief the extreme importance and desirability of some international agreement being arrived at as regards the limits, if any, which should be placed upon contracts of carriage. The subject is a large one, but the discussion upon the Harter Act showed what injustice may be done if nations attempt to restrain contracts in regard to goods imported into their country. This branch of the law is closely connected with the previous work of the Association, for by its labours the York-Antwerp Rules of Marine Insurance were established, and the previous Reports on contracts of affreightment touched on many of the points which arise in connection with restrictions upon maritime contracts. It may be hoped that future papers will direct attention to the unification of the law, so that the vendors and purchasers of goods may know exactly what are risks borne by the carriers and the dangers against which they must protect themselves, and thereby simplify contracts of insurance. The convenient practice of having one bill of lading to cover land transport, transshipment, railway carriage, and marine transit brings out in relief the importance of the question. There is no doubt that there must be mutual concession; insistence by any commercial country upon particular rules such as those embodied in the Harter Act passed in the United States of America might be a fatal bar to a uniform system applicable to all commercial countries.

The discussion as to the Law of Divorce raised many difficult points, and brought out into strong relief the embarrassing position in which parties are placed where the marriage contract has been made between persons of different nationality, and where the offences against the matrimonial contract have taken place in countries governed by a different law, and further the different effect attributed to judgments or decrees in divorce by the Courts of different countries. In this matter it is most desirable to proceed with caution; but the result of the various papers on the discussion thereon seem to indicate that at any rate as regards the grave matrimonial offences of adultery, cruelty, and desertion a great many, if not all, of the civilised countries might agree as to the extent to which they should afford ground for dissolution of the matrimonial contract, and, as to the extent to which the rights of the spouses should be equal. It seems almost hopeless that anything like universal agreement upon all the debatable points will be reached. The condition of the Marriage Laws referred to by Sir Robert Phillimore thirty-one years ago, and quoted by the President, Lord Justice Kennedy, no doubt calls for amendment;

but, upon the other hand, the subject is so thorny, and beset not only with religious difficulties, but touches closely the manners and customs of different countries, that it seems scarcely possible to hope to obtain anything like universal agreement.

One of the subjects which received more consideration than at previous Conferences was that of the administration of the Criminal Law, and most interesting papers on the differences of the criminal procedure in France and Great Britain were read by M. de Monluc and Mr. Ernest Todd, and by Mr. Charteris on the criminal procedure in Scotland. These papers and the discussion which followed upon them showed clearly that each country has much to learn from the other two. To an English lawyer the procedure in France, whereby the accused is at the early stages of proceedings subjected to a severe cross-examination, and the judge presiding at the trial appears as an advocate, is very distasteful. On the other hand, the practice which prevails in England of allowing a prisoner to develop a defence at the trial without any notice beforehand to the prosecution does not promote the interests of justice; it is a snare to the innocent and may at times enable the guilty to go unpunished. It would be well worth the while of some competent student of the Criminal Law to frame a scheme in which the best features of the English, Scottish, and French systems might be combined, both as regards the original procedure and the right and practice on appeals. This subject, as already stated, has not hitherto very closely engaged the attention of the members of the Association. It is not saying too much to express the hope that the very valuable papers contributed at the last Congress may induce experts in Criminal Law in this country and in others to approach the problem of formulating an ideal system following on the work hitherto performed by the Association.

The Resolutions arrived at upon the subject of cheques marked a step towards international agreement. They do not go very far, and of course the different systems which prevail among bankers in different civilised countries make complete agreement difficult, but in the continuous drawing together of the different commercial communities of the world it is in the highest degree important that international agreement in connection with banking should, as far as possible, receive universal assent.

The proposal to include arbitral decrees and records among the judicial orders which can be executed in foreign countries raises very difficult questions. It is open to considerable doubt whether anything short of a judgment of the Supreme Court in civilised countries ought to receive recognition as of right in a foreign country. On the other hand, if parties in a dispute have submitted their differences to a competent tribunal, and have been fully heard, there is much to be said in favour of the argument that an award so arrived at should be respected by all foreign countries.

This brief résumé of some of the important matters raised at the recent Conference leads one to the consideration of the value which should be

assigned to such Associations. They cannot take the place of, nor can their deliberations have as high an authority as, the Institute of International Law, founded in the same year, consisting solely of jurists of repute, and a branch of their work may possibly be better performed by such minor combinations as the Maritime Committee, which during the last few years has been dealing with the questions of salvage, collisions at sea, and maritime contracts; but, upon the other hand, there is ample room for such an Association. The opportunity which their conferences afford for lawyers of different countries to meet together to discuss questions of mutual interest, to amplify their own experience by the experience of others, and to meet to consider points in which systems of other countries differ from and, maybe, are superior to their own, is an ample justification of its existence.

THE NORTH ATLANTIC COAST FISHERIES ARBITRATION.

[Contributed by SIR ERLE RICHARDS, K.C., K.C.S.I.]

THE North Atlantic Coast Fisheries Arbitration was concluded, so far as the main issues are concerned, by the Award given on September 7 last. There are some subsidiary points, arising out of the answer to the first question, which may have to be referred back to the Tribunal, if they should not prove capable of adjustment by the procedure set up by the Arbitrators or by negotiation. But all the substantial matters in dispute have been determined by the Award itself. The case was the most important which has as yet been heard before the Permanent Court at The Hague, and with the possible exception of the Arbitration on the Alabama claims, the most important in which Great Britain and the United States have ever been concerned: indeed the differences now set at rest, or some of them at least, have existed for the best part of a century, and have been the cause of frequent, and at times dangerous, friction. The fact that two great nations have been willing to submit a dispute of so grave a character to The Hague Tribunal, and that the proceedings have been conducted to a successful conclusion, marks a signal advance in the progress of international arbitration.

The Agreement to refer was made under the powers of the General Arbitration Treaty between Great Britain and the United States of 1908. Seven questions were stated in it for the decision of the Tribunal, and the procedure to be followed was in part specified and for the rest was left to be governed by the provisions of The Hague Convention for the settlement of international disputes of 1907. The Arbitrators were selected by agreement from the panel of members of the Permanent Court at The Hague. They were Mr. H. Lammasch of Austria, who was subsequently chosen as president; H.E. Jonkheer A. F. De Savornin Lohman of the Netherlands; the Hon. Judge Gray of the United States; the Right Hon. Sir Charles Fitzpatrick, Chief Justice of Canada; and the Hon. Luis Maria Drago of the Argentine Republic.

The usual procedure was followed in the preliminary stages, and written cases, counter-cases, and arguments were exchanged within the times specified in the Agreement. On June 1 the oral argument was commenced and continued till August 12, on which day it was finally concluded. The

case was opened on behalf of Great Britain, by Sir R. Finlay, who spoke for eight days, and he was followed by Senator Turner, who occupied a like time. Then came, in order, Sir James Winter of Newfoundland, Mr. Warren of the United States, Mr. Ewart of Canada, and Mr. Elder of the United States. The Attorney-General summed up for Great Britain, and Senator Elihu Root for the United States.

The general nature of the questions in dispute is, probably matter of common knowledge. They arose on the construction of the treaty of 1818 between Great Britain and the United States, and related to the extent of the rights conferred by that treaty on American fishermen in British North American waters. Under the Treaty of Independence of 1783 the inhabitants of the United States had a general right of fishing in those waters. But when the war of 1812 broke out between the two countries Great Britain held that this right had come to an end. The United States did not assent to the British view, but the difference between them did not at that time prove capable of adjustment, and the treaty of peace signed at Ghent in 1814 was silent as to the fisheries. Discussion and negotiation followed, and the dispute was finally settled by the treaty of 1818. It is therefore by the terms of that treaty that the rights of American fishermen in Newfoundland and Canadian waters are now governed.

The Award is a document of high importance both from an historical and a legal point of view. It is not confined to a mere statement of the answers of the Tribunal to the specific questions put to it, but discusses, in some detail, the main contentions advanced on either side and states with precision the reasons on which the answers are based. Of the questions referred, the greater number turn on the particular circumstances of the case and do not involve the consideration of any general principles of international law. But on the two main points of controversy—the question as to the right of Great Britain or her colonies to regulate the exercise of fishing rights by Americans in British waters and the question as to the extent of the bays from which Great Britain may exclude Americans—the Tribunal have expressed opinions which must leave an imprint on the law of nations.

On the first of these questions the British contention was, in short, that the mere grant of a liberty to fish did not carry with it any exemption from municipal regulation, that there was nothing in the treaty which could be construed as a surrender by Great Britain of her powers as the territorial sovereign of the waters in question, and that in the absence of any such provision those powers remained unaffected. It was admitted that the treaty imposed some limitation on the exercise of those powers, and that Great Britain must be taken to have agreed not to make laws or regulations which would restrict the fishing, carried on by Americans, unless such restrictions were necessary for the protection of the fisheries or the preservation of law and order or other like purposes and did not discriminate

unfairly between the fishermen of the two countries. Subject to this treaty obligation, Great Britain contended that she or her colonies might legislate without the approval or concurrence of the United States.

The American contention, on the other hand, was that Great Britain had no right at all to regulate the exercise of the treaty liberties and that even if such a right did exist it could be exercised only with the approval and concurrence of the United States.

Dealing with these contentions the Tribunal at the outset decides that the right to regulate is an attribute of sovereignty and as such must be held to reside in the territorial sovereign unless the contrary be provided in the treaty, and declares the onus to be on the United States to show that this had been done in the present case. The judgment on this point is of value: it is an express decision that the mere grant of a liberty such as that in question, without more, does not involve any surrender of the sovereign rights of the grantor State.

The Arbitrators then proceed to examine the arguments advanced by the American counsel in order to discharge this onus, and take up first those which went to show that Great Britain had no right of regulation at all. These are treated under nine separate headings, and the judgment of the Tribunal is stated in the form of reasons under each heading.

The discussion of the first two of these headings depends on the particular facts of the case, but that numbered (3) relates to a contention of general interest raised in the written argument of the United States and presented to the Tribunal with much force and learning by Senator Turner. It was, in effect, that the grant of fishing liberties in British waters to the inhabitants of the United States constituted an international servitude; and that it followed, according to the principles of international law, that Great Britain, the servient State, had no right to regulate the liberties so granted. In support of this proposition a large number of writers were quoted and special reliance was placed on an essay on the subject of State servitudes by Dr. Clauss. In reply to this argument it was pointed out by the British counsel, amongst other things, that the greater part of the passages cited had reference to the relations *inter se* of the States of the Holy Roman Empire; that no instance was adduced in which this suggested principle had ever been accepted in practice; and that if it were to receive the sanction of the Tribunal it would apply equally to treaties conferring rights to trade, to reside, and the like, and that the consequences would be far-reaching.

The Arbitrators have rejected the American argument on this point. They hold that the doctrine of international servitude was not one with which the negotiators of 1818 were familiar, and they decline to accede to the proposition of international law involved in the contention of the United States. Their reasons, so far as they bear on the general question of law, are stated in the following paragraphs:

Because a servitude in international law predicates an express grant of a sovereign right and involves an analogy to the relation of a *prædium dominans* and a *prædium serviens*; whereas by the treaty of 1818 one State grants a liberty to fish, which is not a sovereign right, but a purely economic right, to the inhabitants of another State;

Because the doctrine of international servitude in the sense which is now sought to be attributed to it originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire of which the *domini terræ* were not fully sovereigns; they holding territory under the Roman Empire, subject at least theoretically, and in some respects also practically, to the Courts of that Empire; their right being, moreover, rather of a civil than of a public nature, partaking more of the character of *dominium* than of *imperium*, and therefore certainly not a complete sovereignty. And because in contradistinction to this quasi-sovereignty with its incoherent attributes acquired at various times, by various means, and not impaired in its character by being incomplete in any one respect or by being limited in favour of another territory and its possessor, the modern State, and particularly Great Britain, has never admitted partition of sovereignty, owing to the constitution of a modern State requiring essential sovereignty and independence;

Because this doctrine being but little suited to the principle of sovereignty which prevails in States under a system of constitutional government such as Great Britain and the United States, and to the present international relations of sovereign States, has found little, if any, support from modern publicists. It could therefore in the general interest of the community of nations, and of the parties to this treaty, be affirmed by this Tribunal only on the express evidence of an international contract.

The fourth heading relates to the meaning of the words "in common" used in the treaty, and is not of general importance.

The fifth heading deserves attention on account of its historical interest. It relates to the theory of "partition," which has been much relied on by the United States. It was said that the treaty of 1783 was not a treaty between two independent Powers, but was a partition of common property between two co-owners, and that the co-owners preserved their sovereign rights in the parts respectively allotted to them; that the United States therefore had sovereign rights in these fisheries. It was then argued that the war of 1812 did not terminate the treaty of 1783, and that the treaty of 1818 was a mere renewal of the same fishing rights as were granted by the former treaty. It followed, as it was said, that the treaty of 1818 must also be construed as a partition between co-owners, and not as a grant of fishing rights to an alien Power by the sovereign of the waters covered by the grant.

On this point too the Tribunal have rejected the American argument. Their judgment is as follows:

Although the Tribunal is not called upon to decide the issue whether the treaty of 1783 was a treaty of partition or not, the questions involved therein having been set at rest by the subsequent treaty of 1818, nevertheless the Tribunal could not forbear to consider the contention on account of the important bearing the controversy has upon the true interpretation of the treaty of 1818. In that respect the Tribunal is of opinion:

- (a) That the right to take fish was accorded as a condition of peace to a foreign people; wherefore the British negotiators refused to place the right of British subjects on the same footing with those of American inhabitants; and further, refused to insert the words also proposed by Mr. Adams—"continue to enjoy"—in the second branch of Art. III. of the treaty of 1783;
- (b) That the treaty of 1818 was in different terms, and very different in extent, from that of 1783, and was made for different considerations. It was, in other words, a new grant.

It will be observed that the general question of the effect of war on treaties, a subject on which international law does not at present speak with precision, is not dealt with in the judgment. It was unnecessary to do so since the Arbitrators held that the treaty of 1818 was a new grant.

The other headings under the first contention are not of general importance.

In regard to the second contention, that the right of regulation, even if it existed at all, could not be exercised by Great Britain without the consent of the United States, the decision of the Tribunal is equally adverse to the American claims. It is to be best gathered from the following extracts from the judgment:

Considering that the recognition of a concurrent right of consent in the United States would affect the independence of Great Britain, which would become dependent on the Government of the United States for the exercise of its sovereign right of regulation, and considering that such a co-dominium would be contrary to the constitution of both sovereign States, the burden of proof is imposed on the United States to show that the independence of Great Britain was thus impaired by international contract in 1818 and that a co-dominium was created.

For the purpose of such proof it is contended by the United States:

That a concurrent right to co-operate in the making and enforcement of regulations is the only possible and proper security to their inhabitants for the enjoyment of their liberties of fishery, and that such a right must be held to be implied in the grant of those liberties by the treaty under interpretation.

The Tribunal is unable to accede to this claim on the ground of a right so implied:

Because every State has to execute the obligations incurred by treaty *bona fide*, and is urged thereto by the ordinary sanctions of international law in regard to observance of treaty obligations. Such sanctions are, for instance, appeal to public opinion, publication of correspondence, censure by Parliamentary vote, demand for arbitration with the odium attendant on a refusal to arbitrate, rupture of relations, reprisals, etc. But no reason has been shown why this treaty, in this respect, should be considered as different from every other treaty under which the right of a State to regulate the action of foreigners admitted by it on its territory is recognised;

Because the exercise of such a right of consent by the United States would predicate an abandonment of its independence in this respect by Great Britain, and the recognition by the latter of a concurrent right of regulation in the United States. But the treaty conveys only a liberty to take fish in common, and neither directly nor indirectly conveys a joint right of regulation;

Because if the consent of the United States were requisite for the fishery a general veto would be accorded them, the full exercise of which would be socially subversive and would lead to the consequence of an unregulatable fishery;

Because the United States cannot by assent give legal force and validity to British legislation.

In the result the Tribunal has decided in favour of Great Britain on Question I., and has set up a procedure by which disputes as to the reasonableness of any future regulation may be determined, in accordance with the provisions of Art. IV. of the Agreement to refer. Objections to existing regulations will be considered by the Tribunal itself, if not settled by the experts appointed to report on them.

The second subject of general importance is that involved in the discussion of Question V. as to the extent of the inclosed waters which may be properly claimed as territorial according to the law of nations. By the treaty of 1818 the United States renounced any liberties of taking fish or drying or curing fish theretofore enjoyed or claimed on or within three marine miles of any of the coasts, bays, creeks, or harbours of, H.B.M.'s Dominions in America within certain limits. The bays in question were, speaking generally, those on the coast of Canada, and those on the E. and S.E. coast of Newfoundland. It will be seen on reference to a map that there are a large number of bays on these coasts varying greatly in size and configuration, including some tracts of water of considerable extent, such as the Bays of Chaleur and Miramichi in Canada, and Fortune and Conception Bays in Newfoundland. The Bay of Fundy is the subject of a special agreement of many years' standing, and was not included in the present reference, nor was the Gut of Canso.

The difference between the two countries was as to the meaning of the word "bays" in this clause. In short, Great Britain contended that the term included all those waters which were generally known as bays in 1818: the United States contended that it applied only to waters included within the three-mile line from shore, that is, to bays of which the entrance was not more than six miles in width.

The judgment of the Tribunal commences by pointing out that the term "bays" is used in the treaty without qualification, and decides that the term—

must be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions then prevailing, unless the United States can adduce satisfactory proof that any restrictions or qualifications of the general use of the term were or should have been present to their minds.

The arguments of the United States are then examined in order. The Tribunal rejects the proposition that a State cannot renounce the natural right to fish on the high seas, and points out that such an abandonment had

been made in these very waters by France and Spain respectively. It rejects the argument that the expression "bays of His Britannic Majesty's Dominions" must be read as including only those bays which were under the territorial sovereignty of Great Britain. It holds that the expression is used in a geographical sense, and has no reference to political control.

The Tribunal then passes on to the contention that the three-mile limit which applied in regard to coast applies equally to bays. On this point the material passages in the Award are as follows :

It has been further contended by the United States that the renunciation applies only to bays six miles or less in width *inter fauces terre*, those bays only being territorial bays, because the three-mile rule is, as shown by this Treaty, a principle of international law applicable to coasts and should be strictly and systematically applied to bays.

But the Tribunal is unable to agree with this contention :

Because admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce, and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally, in proportion to the penetration inland of the bay ; but as no principle of international law recognises any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the treaty of 1818 as excluding bays in general from the strict and systematic application of the three-mile rule ; nor can this Tribunal take cognisance in this connection of other principles concerning the territorial sovereignty over bays such as ten-mile or twelve-mile limits of exclusion based on international acts subsequent to the treaty of 1818 and relating to coasts of a different configuration and conditions of a different character ;

Because the opinion of jurists and publicists quoted in the proceedings conduce to the opinion that speaking generally the three-mile rule should not be strictly and systematically applied to bays ;

Because from the information before this Tribunal it is evident that the three-mile rule is not applied to bays strictly or systematically either by the United States or by any other Power.

The Tribunal has therefore expressly rejected the proposition that the three-mile rule, which is generally accepted in regard to open coasts, applies equally to inclosed waters.

The next point is also of general interest :

It is further contended by the United States that such exceptions only should be made from the application of the three-mile rule to bays as are sanctioned by conventions and established usage.

But the Tribunal, while recognising that conventions and established usage might be considered as the basis for claiming as territorial those bays which on this ground might be called historic bays, and that such claim should be held valid

in the absence of any principle of international law on the subject; nevertheless is unable to apply this, *a contrario*, so as to subject the bays in question to the three-mile rule, as desired by the United States:

(a) Because Great Britain has during this controversy asserted a claim to these bays generally, and has enforced such claim specifically in statutes or otherwise, in regard to the more important bays such as Chaleur, Conception, and Miramichi.

(b) Because neither should such relaxations of this claim, as are in evidence, be construed as renunciations of it; nor should omissions to enforce the claim in regard to bays as to which no controversy arose be so construed. Such a construction by this Tribunal would not only be intrinsically inequitable but internationally injurious; in that it would discourage conciliatory diplomatic transactions and encourage the assertion of extreme claims in their fullest extent.

The award on the whole question is summarised as follows:

The negotiators of the Treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of "bays"; they most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the Treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea, and other circumstances not possible to enumerate in general.

For these reasons the Tribunal decides and awards:

In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.

This is in substance an acceptance of the British contention.

The Tribunal has not, however, contented itself with the mere expression of an opinion on the question of construction. The Arbitrators have thought that the Award by itself would still leave room for dispute in its application to particular cases. They therefore recommend that the parties should accept an arrangement which follows very closely, if it is not identical with, the Chamberlain-Bayard Treaty of 1888 which was accepted by Great Britain but rejected by the Senate of the United States at that time. The effect is to delimit specific boundaries at the entrances of ten of the most important bays, and as to the smaller bays to fix a general boundary by a line drawn three miles seaward from the point where each bay narrows to ten miles. This general limit of ten miles is supported by reference to the various Fisheries Conventions under which a similar rule has been adopted and found convenient in practice. Conception Bay is given to Great Britain because it was covered by the decision of the Privy Council in the case of *The Direct United States Cable Company v. The Anglo-American Telegraph Company* (L.R. 2

A.C. 374) in which decision the Tribunal holds the United States to have acquiesced. This recommendation is made under Art. IV. of the Compromis.

On this question and on this alone the Tribunal is not unanimous. Dr. Drago has entered a written dissent in which he gives his reasons for holding that the treaty should be construed as applying to ten-mile bays only with the exception of the Bays of Conception, Chaleur, and Miramichi. The following passage appears to summarise the position of Dr. Drago :

So it may be safely asserted that a certain class of bays, which might be properly called the historical bays such as Chesapeake Bay and Delaware Bay in North America and the great estuary of the River Plate in South America, form a class distinct and apart and undoubtedly belong to the littoral country, whatever be their depth of penetration and the width of their mouths, when such country has asserted its sovereignty over them, and particular circumstances such as geographical configuration, immemorial usage, and above all, the requirements of self-defence, justify such a pretension. The rights of Great Britain over the bays of Conception, Chaleur, and Miramichi are of this description. In what refers to the other bays, as might be termed the common, ordinary bays, indenting the coasts over which no special claim or assertion of sovereignty has been made, there does not seem to be any other general principle to be applied than the one resulting from the custom and usage of each individual nation as shown by their treaties and their general and time-honoured practice.

It will be observed that the learned Arbitrator differs from his colleagues in holding that the treaty refers to territorial bays only and in thinking that the limit of territorial jurisdiction over bays should be fixed by the custom and usage of each individual nation. In the present case he would fix the limit by reference to the North Sea Conventions and Regulations to which Great Britain had been a party from 1839 to 1882. He does not think that the fact that Great Britain has during this controversy continually asserted a wider claim in regard to the bays in question is sufficient to outweigh this usage, although it is subsequent to the treaty. He is of opinion that the ten-mile rule for bays is connected with the three-mile coast limit and is simply "an extension, a margin given for convenience to the strict six miles with fishery purposes." After examining the various cases in which Great Britain has assented to the ten-mile limit in the North Sea, since 1839, he holds—

that a usage so firmly and for so long a time established ought, in my opinion, to be applied to the construction of the treaty under consideration, much more so when custom, one of the recognised sources of law, international as well as municipal, is supported in this case by reason and by the acquiescence and the practice of many nations.

It has not been the purpose of this note to do more than to point out the procedure followed by the Tribunal and to call attention to the questions of general law dealt with in the Award. The judgments on these questions will necessarily command the deliberate attention of the

statesmen and lawyers of all countries: and both on them and on those which depend on the particular facts of the case, there is certain to be the fullest discussion on other occasions and in other places. On some points there may be, and will be, differences of opinion in the countries affected; but it is satisfactory to know that all parties left the court in the confident assurance that their respective arguments had been patiently heard and fully considered. And if it may be permitted, with the greatest respect, to place the fact on record, the dignity and impartiality of the Tribunal, throughout the long hearing, were worthy of the great Court of which the Arbitrators are members.

THE COMMONWEALTH CONSTITUTION AND ITS DEVELOPMENT.

[Contributed by SIR COURTENAY ILBERT, K.C.B., K.C.S.I.]

MR. HARRISON MOORE'S *Commonwealth of Australia*, of which the first edition appeared in 1902, the year after the establishment of the Commonwealth, at once took rank as a constitutional treatise of the highest value and importance. He has now brought out a second edition, and has incorporated in it the materials which have accrued up to the date of the last general election in May 1910. During the nine years and more which have elapsed since the Constitution was brought into being, it has been developed in various ways, by amending and supplementary legislation, by interpretations and decisions of the Australian High Court and the Judicial Committee of the Privy Council, by administrative and parliamentary practice and usage. Of all these materials Mr. Moore has made careful, abundant, and instructive use. In his first edition he traced the history, described the ground plan, and elucidated the fundamental principles of the Constitution. In this new edition he has been able to show how the Constitution has worked in practice during the first critical years of its existence.

When this edition appeared, only two Acts amending the Constitution had obtained, by means of the referendum, the required approval of the electors. One of these modified the plan of election of senators, the other enabled the Commonwealth to take over State debts incurred since its establishment. Other amending Acts have since been passed by the new Parliament and await ratification by the electorate. But supplementary legislation, dealing with matters falling within the competence of, and requiring prompt attention by, the new central Legislature, has been extensive, varied, and important. They include the Acts transferring the Customs and Excise departments from the States to the Commonwealth, and imposing uniform duties of customs and excise; the Act establishing a general postal and telegraph service; Acts regulating the powers and procedure of the High Court and the constitution of the Commonwealth Civil Service; Acts regulating the parliamentary franchise at Commonwealth elections and prescribing the procedure to be observed on a referendum; a great Defence Act, constituting a defence force with two branches, the permanent forces and the citizen force; a general Trade Marks Act; and Acts dealing with difficult and highly controversial subjects, such as that passed for the gradual extinction of the system of im-

ported Kanaka labour in the northern part of the continent, those for imposing restrictions on immigration, the Act of 1902 dealing with industrial disputes extending beyond the limits of any one State and constituting a Commonwealth Court of Conciliation and Arbitration for the settlement of such disputes; and, lastly, a general Act for old-age pensions. All these measures (most of which are summarised in the "Legislation of the Empire") receive careful and adequate treatment from Mr. Moore.

Not less important are the judicial decisions of the same period. Among them are the income-tax cases, in one of which, *Webb v. Outtrim*, the Judicial Committee found itself in conflict with the High Court. The Commonwealth Conciliation and Arbitration Act, 1902, has given rise to much litigation. In one case it was held that the jurisdiction under it extended to disputes between owners of and seamen on ships trading between Sydney and Calcutta. On the other hand, it has been held that the operation of the Act is limited by the rights and powers of the several States. Thus in the *State Railway Servants* case the High Court held that the specific inclusion in the Act of disputes in relation to employment on State railways was *ultra vires* an invasion of the exclusive powers of the States. But in the *Jumbunna* case it was held that an association is competent to register under this Act, though it consists exclusively of persons engaged in industry in one State and in the employment of persons whose business is confined to that State. The nature of an "industrial dispute" and the circumstances in which it should be treated on extending beyond the limits of any one State were much discussed in the *Woodworkers* case and in the *Broken Hill* case. The great case of *The King v. Barger* raised in the broadest form the question of the relations between the Commonwealth and the several States, and gave rise to a serious difference of opinion between the majority and the minority of the High Court. The case arose out of an attempt by the Commonwealth Legislature to apply the principles of what is known in Australia as the "new protection," which aims at securing to the workman a reasonable share of any profit accruing to employers from protection taxes.

To effect this object in a particular industry the Legislature passed an Act entitled "The Excise Tariff, 1906," which, in the case of agricultural implements, imposed "duties of excise" on the manufactured article, but declared that it should not apply to goods manufactured under certain conditions as to the remuneration of labour. The majority of the Court held that the Act was invalid, partly because it was an attempt to regulate the conditions of labour under the guise of a taxing Act, partly because it contravened the provision of the Constitution prohibiting discrimination or preference between the several States. The minority took a different view on both points. The judgments are of great interest and importance, both on account of the principles involved and on account of the personalities of the judges. The majority of them looked with evident suspicion on any attempt to encroach on the rights and powers of the several States. The minority

conferences between the State Premiers and between them and the Prime Ministers of the Commonwealth, though not expressly or formally recognised by the instrument of government, have already played and seem likely to play a very important and useful part in the working of the constitution.

Mr. Harrison Moore's book may advantageously be studied in connection with two other recent books, written from somewhat different points of view. Mr. Keith's *Responsible Government in the Dominions* is written from the Colonial Office point of view, and studies Australia as a part of a larger problem. Mr. Wise, in his *Commonwealth of Australia*, writes as a lawyer who has taken an active and practical part in Australian politics. Mr. Harrison Moore's point of view is that of a professor of constitutional law, but of a professor living in the midst of the persons and things about which he writes.

THE GREAT JURISTS OF THE WORLD.

XII.—FRIEDRICH CARL VON SAVIGNY.

[Contributed by J. E. G. DE MONTMORENCY, ESQ.]

THE ancient family to which Friedrich Carl von Savigny belonged was of Lorraine origin, deriving its name from the Castle of Savigny, near Charmes, in the valley of the Moselle, and Paul de Savigny, an ancestor of the jurist, was born at Metz in 1622. The family were Calvinists, and retained their German allegiance on the transfer of Lorraine to France. Paul entered the Swedish army, and settled in a military capacity in Germany, dying at Kirchheim in 1685. His son Louis-Jean became a lawyer, and served the Prince of Nassau. In 1692 he published a work attacking the ambitious wars of Louis XIV. He died in 1701. His son Louis, who was born in 1684 and died in 1740, also held a political office. Chrétien-Charles-Louis, the son of Louis, was born in 1726 at Trarbach on the Moselle, and attained to a considerable position in diplomatic and political circles. He was a member of the assembly which met at Frankfort to represent one of the ten Circles of the Empire, the Circle of the Upper Rhine. On this body he was a representative of various princes. Friedrich Carl von Savigny (to adopt the German form of the name) was born at Frankfort on February 21, 1779. The father of the jurist was a Lutheran, the mother a Calvinist. In those days the Calvinists were not allowed to worship in Frankfort, though the ministers were very gifted men. The town was dominated by the Lutherans, who made up for the inefficiency of their clergy by the sufficiency of their police. The Calvinists were obliged to worship out of the town at the village of Bockenheim, and thither, Sunday by Sunday, the little fellow was taken by his mother, despite the father's adherence to the popular faith.

His mother watched over the child's early education with exemplary care. M. Charles Guenoux tells us that "she taught him French with the tragedies of Racine and *Les Veillées du Château* of Madame de Genlis. He had hardly reached the age of three years when she was already reading the Bible to him, and perhaps we ought to attribute to her lessons and to her example that truly religious spirit which formed one of the salient traits in the

character of her son." Her life had many sorrows to foster her natural piety. All her children except Frédéric died young, and in 1791 her husband died. In 1792 she herself passed away, and at the age of thirteen Friedrich Carl von Savigny was left an orphan without sisters or brothers. His father's best friend, a famous lawyer, M. de Neurath, the Assessor of the Imperial Chamber at Wetzlar, became another father to the boy, and personally superintended the education of his son and Friedrich von Savigny. When they reached the age of fifteen he plunged them into a terrible course, comprising the science of law, natural law, international law, Roman law, German law, and so forth. The principles were driven into the boys' minds by the system of question and answer, and finally they were induced to commit to memory a vast volume of speculative thought. It was an extraordinary training, recalling to some extent the aridity of Mill's early life, but it was modified by the abiding influence of his mother and the personal tenderness of M. de Neurath. We are told that Savigny revolted against the unreality of this shadow-land of thought. Indeed his whole after-life of work was in a sense a protest against the unhistoric school of thought which robbed in unreality his earliest period of intellectual effort. Neurath's lessons must, however, have been extraordinarily effective, for they turned the entire interests of the youth into the direction of the theory and history of law. At the age of seventeen (Easter 1795) he joined Marburg University, and attended successive courses by Erxleben and Weiss on the Pandects.

Weiss was a dramatic and effective teacher, and he placed his fine library at the disposal of Savigny, who became one of his private pupils. Indeed, though not a lawyer of great fame, he really turned the mind of Savigny in the direction of the change of method that was then in the air. Weiss was a bitter opponent of Wolff and other standard authors, and though he did not accept the entire views of Hugo and Naubold, he felt that a sense of history or evolution was a necessary element in the study of law. Savigny, who had suffered as a boy many things from what we may call the *à priori* school of law, drank in the new doctrine with avidity, and, passing in October 1796 to the University of Göttingen, his historical leanings were confirmed by the brilliant lecturing of Spittler on universal history. Göttingen had nothing else worth having to give this student, but it did, in fact, give him the one thing needful at that moment. An illness in the spring of 1797 interrupted work, and in October Savigny returned to Marburg for further study. From 1799 to 1800 he travelled through Germany, visiting various universities, including Leipzig and Jena, and devoting his entire time to study. In the year 1800 he received the degree of doctor at Marburg, his dissertation on the occasion being entitled *De concursu Delictorum formali* (*Vermischte Schriften*, iv. 74). The same year he became an authorised teacher (*Privat docent*) at Marburg, and lectured on criminal law. He also lectured (as an additional or extraordinary professor) on the ten last books of the Pandects Ulpian, the Law of Succession, Obligations, the Methodology of

Law, and the History of Roman Law. In these courses we indeed see laid out the ground-plan of his life's work. M. Guenoux (from whose work this life of Savigny is largely derived¹) tells us of the growth of his attitude towards history. He says :

L'Histoire du droit Romain de Hugo avait excité vivement l'intérêt de Savigny, et par ses formes souvent énigmatiques, plutôt éveillé que satisfait sa curiosité. Les améliorations de onze éditions successives ont plus que décuplé l'ouvrage original sans faire disparaître entièrement ce caractère. Au reste, Savigny a toujours professé une respectueuse reconnaissance pour les travaux de Hugo, et quoiqu'il n'ait jamais suivi ses cours, c'est peut-être le seul jurisconsulte moderne qui ait eu de l'influence sur son développement.

No doubt this is largely true, but in fact Savigny came upon the scene at a moment when there was a struggle in progress between the supporters of the school of traditional learning and thinkers of the Hegelian type who desired to demonstrate and share in the processes of evolution or history. It must be remembered that Savigny represents a stage in a movement that is really a Renaissance movement, and that the eighteenth-century theories of law as put forward by Wolff and Vattel and many of their followers was rather an intellectual interlude than a definite disturbance of the Renaissance movement. The pre-Renaissance jurisconsults from the twelfth to the fifteenth century, the Glossators² as they are called, had been engaged in the practical work of deriving from Roman law a working code that should destroy and replace the rapidly forming feudal law. With the Renaissance came Italian and French thinkers destined to do more than this—André Alciat (1492—1550) and Jacobus Cujacius (Jacques Cujas) of Toulouse (1522—1590). Joseph Scaliger said of these two men, "Ce qu'Alciat a commencé, Cujas l'a accompli." Alciat gave new life, new literary form, to the study of jurisprudence; but Cujas did more than this, he penetrated into the very spirit of Roman law. M. Lermier, in his *Introduction générale à l'Histoire du Droit* (1829, cap. v. pp. 43-6), says of Cujas :

Ne craignons pas de le dire, il a aimé le droit romain en poète, il a nourri le sentiment le plus profond de sa réalité, et, par l'énergie qu'il a déployée dans cette voie, il s'est fait le véritable fondateur de l'école historique du droit : c'est de lui que procède l'école historique allemande en ce qui touche le droit romain. . . . Son génie : c'est un esprit d'historien, c'est une imagination d'artiste ; sous sa plume, tout est historique, individuel ; aussi dans la volumineuse collection de ses œuvres vous ne trouverez pas un ouvrage qui ne soit un commentaire, une explication, une note sur les vestiges de l'antiquité. Cujas est le modèle de l'exégèse.

¹ *Histoire du Droit Romain au Moyen-âge* par M.^e de Savigny, traduite de l'Allemand sur la dernière édition et précédée d'une notice sur la vie et les écrits de l'auteur par M. Charles Guenoux (four volumes, one and two in one, Paris, 1839). But see also for the life of the jurist, *Friedrich Carl von Savigny : sein Wesen und Wirken*, von Professor Rüdorff (Weimar, 1862), and a paper by Mr. William Guthrie in the *Law Magazine and Review* for May 1863.

² The jurisconsults of the school of Bologna, Accurse, Bartôle, Vinerius, etc. (see *Nouvelle Biographie Générale*, tome xii, art. de Cujas, col. 592).

The learned writer (M. Rapetti) of the article on Cujas in the *Nouvelle Biographie Générale*, after quoting the opinion of M. Lermnier, adds this important reflection :

L'œuvre de Cujas ne fut pas seulement une explication plus habile de la loi romaine, un modèle d'exégèse, une révélation du vrai génie de la législation latine : en étudiant la loi romaine comme un objet de restauration historique, Cujas a obtenu un autre avantage ; le premier, il a suscité cette idée, à savoir qu'il est pour chaque civilisation une loi propre, et par là il a contribué à reléguer la loi romaine dans son antiquité vénérable ; il a émancipé de l'empire trop absolu de cette loi l'autonomie des nouvelles sociétés.

Cujas in the immense output of his work foreshadows the industry of Savigny. The six great folios of his collected works¹ overwhelm the mind. The first folio deals fully with four books of the Institutes of Justinian, twenty-nine titles from Ulpian, and with Julius Paulus. The second folio contains the brilliantly restored works of Papinian. The third gives us *Paratitula* in nine books of the *Codicis Justiniani* and a commentary on the three last books (x., xi., xii.) of the Codex, an exposition of the Novels and of the five books relating to Feuds, together with twenty-eight books of observations and emendations. The fourth folio gives us Paulus on the Edict and his books of Questions, and also the *Responsa* of Paulus, Neratius, Marcellus, Ulpian, Modestinus, and Sævola ; Notes on Modestinus and the works of Salvius Julianus. Folios v. and vi. contain the post-mortem publications (edited by T. Guérinus and C. Colombet), comprising Commentaries on no less than seventy-six titles of the Digest and innumerable notes on the Codex of Justinian and on Books ii., iii., and iv. of the Decretals of Gregory IX. Cujas was rightly called *Jurisconsultus*, for he placed Roman law on a new footing and brought it into line with the laws that it was destined to affect. This sturdy and genial scholar¹ and his bitter but brilliant opponent Hugues Doneau (Donellus) (1527—1591) were (in the matter of the study of law) the forerunners of Leibniz (1646—1716), whose juridical works mark a definite stage in the study of the law, works such as *Nova methodus discendæ docendæque jurisprudentiæ* (Frankfort, 1667) and *Codex juris gentium diplomaticus* (1693) with its supplement *Mantissa Codicis gentium diplomatici* (1700) ; of the universal-minded Jean-Etienne Pütter (1725—1807), who at Marburg, Halle, and Jena became deeply proficient in classics, mathematics, philosophy, Roman, feudal, and public law, who lectured on law (1746) at Göttingen, who produced between 1776 and 1783 his *Bibliographica du droit public allemand*, who wrote his *Manuel de l'histoire d'Allemagne* in 1772 and his

¹ Jacobi Cuiacii, *IC. Operum quæ de jure fecit*, Paris, Apud Hervetum du Mesnil 1637. Four volumes in six, prefaced by a life of, and many epitaphs on Cujas.

² "Vir quadrato corpore, firmoque ac bene constituto, adeo ut ex eo manans sudor non insuavis esset odoris (quod ille naturæ beneficium cum Alexandro Macedone commune se habere ludens nonnumquam inter amicos jactavit), statura brevi, barba tum longa et cana, sed in juventute nigerrima, capillitio simili, colore candido, voce firma et clara" (*Vita*).

Développement historique de la constitution de l'empire d'Allemagne in 1786. In Pütter we see the exact spirit of the historical school. A descendant of these men was Gustave Hugo (1764—1844), who deliberately based his methods on Leibniz and Pütter. He devoted much time to the historical documents and legislation connected with Roman law, and in 1788 published *Les Fragments d'Ulpian*, and was at once called to a professorship at Göttingen. Hugo classified law into persons (their state, their relations to the family and the city, their nature, character, and the method of acquiring and losing property) and the actions necessary for establishing or defending rights. This classification was adopted in the Civil Code. This was a philosophical classification. But Hugo did not neglect history. He divided Roman law into three periods: the period up to the xii. Tables, the Prætorian, and the Imperial periods. In 1790 he issued a History of Roman Law, in 1812 a Manual of Roman Law since the time of Justinian, and between 1818 and 1829 he published his Elements of the History of Roman Law up to the time of Justinian. Through Hugo the whole historic school from the days of the Renaissance concentrated on Savigny.

At Marburg Savigny instantly made his mark as a teacher. We have the testimony of Jacob and Wilhelm Grimm (who both were pupils of his in 1802 and 1803) as to his capacity. Wilhelm Grimm wrote in his autobiography (pp. 170-1) as follows:

Il me semble que ce qui attirait et captivait si puissamment ses auditeurs, c'était la facilité et la vivacité de sa parole jointes à tant de calme et de mesure. Les talents oratoires peuvent éblouir quelque temps, mais ils n'attachent pas. Savigny parlait d'abondance et ne consultait qu'à rarement ses notes. Sa parole toujours claire, sa conviction profonde et en même temps une sorte de retenue et de modération dans son langage faisaient une impression que n'aurait pas produite l'éloquence la plus abondante, et tout en lui concourait à l'effet de sa parole. . . .

Il nous fit comprendre la valeur des études historiques et l'importance de la méthode. Ce sont là des obligations que je ne saurais trop reconnaître, car sans lui je n'aurais peut-être jamais donné à mes études une bonne direction. Pour combien de choses n'a-t-il pas éveillé notre intérêt! Combien de livres n'avons-nous pas empruntés à sa bibliothèque! Avec quel charme ne nous a-t-il pas lu quelquefois des passages de Wilhelm Meister, des poésies de Goethe! L'impression que j'en ai conservée m'est encore si présente qu'il me semble l'avoir entendu hier.

It is a charming picture, bringing out not only the learning and the clarity of the man but his humanity and charity. One impression conveyed by the lectures is the impression that all great lecturers indelibly impress on the minds of their pupils. Who that heard Maitland lecture can think of it as having been further away than yesterday? But Savigny was only twenty-three when he so impressed the great Grimm brethren!

Thirty years later he made a similar impression on M. Charles Guenoux. He wrote in 1839:

¹ The influence of Haubold (1766—1824) on Savigny must also be kept in mind.

Ce qui m'a surtout frappé, c'est la vivacité et la chaleur d'un cours qu'il répétait alors pour la vingt-cinquième fois. Son enseignement offre chaque année un intérêt nouveau, parce que chaque année on y retrouve le fruit de nouvelles études, les découvertes les plus récentes et le dernier état de la science. Aussi Savigny n'est-il pas insensible à l'intérêt qu'il excite dans son nombreux auditoire, et c'est ce qui lui fait continuer ses leçons quand des travaux plus importants peut-être sembleraient demander tout son temps. Sa parole abondante et précise éclaire si bien les matières les plus obscures que ses élèves n'en soupçonnent la difficulté, que si plus tard ils ont besoin de chercher une solution qui leur est échappée. Sa méthode est surtout remarquable lorsqu'à propos de matières controversées, il a occasion d'exposer des doctrines nouvelles. Sa parole, alors plus simple et plus grave, exprime une conviction profonde jointe à une modestie sincère; bien différent de ces professeurs qui, pour persuader leur auditoire, recourent à tous les artifices de l'avocat comme s'il s'agissait d'un plaidoyer, et font d'une question scientifique une question d'amour-propre et de personnes.

Savigny's success as a teacher did not check, nay, rather encouraged, his efforts as a student. His business as yet was not to write books but to study texts, and so to make possible a real revival in the scientific study of law. His master Hugo had already done much in this direction. M. Guenoux points out, as I have ventured to point out above, the value of Hugo's work. He found a lifeless and arbitrary school of Roman lawyers at work, men who never recognised the heredity, so to speak, of Roman law, men who had forgotten the lessons of the Renaissance.

Mais en 1788, Hugo appela l'attention sur Ulpian et commença une réforme semblable à celle que Cujas avait accomplie au seizième siècle. Animé du même esprit que ce grand homme, il remplaça la science du droit sur ses véritables bases en lui restituant le secours de la philosophie et de l'histoire. Haubold et Cramer partagent avec Hugo la gloire de cette régénération de la science.

M. Guenoux goes on to protest against the belief in his time (1839) that German jurists fell into two schools, the historical school and the philosophical school. The distinction was merely one of *pace*; all followed the Cujacian School and refused to isolate jurisprudence from either philosophy or history. That may have been the case in 1839, but it certainly was not the case in the mid eighteenth century, when eminent jurists, men such as Wolff and Vattel, did in fact base new jurisprudence on *à priori* theories. The great triumph of the school of which Savigny is the shining and immortal light was the absolute destruction of the *à priori* method and the establishment on an impregnable basis of the vital and vitalising principles of the Renaissance.

In 1803 appeared Savigny's famous work on the Right of Possession, *Das Recht des Besitzes*. It is not possible (from considerations of space) here to supply an analysis of this treatise, but something must be said as to the scope and value of a work which Austin in his *Province of Jurisprudence Determined* (ed. 1832, App. p. xxxviii) declared to be "of all books upon law, the most consummate and masterly." It is divided into six books,

The first deals at length with the notion of Possession. Savigny says that "by the possession of a thing, we always conceive the condition, in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded." The exercise of property takes place by virtue of this condition of detention. Savigny's object was to consider the rights of possession (*jus possessionis*), and not the right to possess (*jus possedendi*), and in the first book he defines the notion in form and in substance: "in form by describing the rights which require possession for their foundation, thus giving the meaning which the non-juridical notion of Detention acquires in jurisprudence so as to allow it to be understood as a legal entity, as Possession; in substance by enumerating the conditions which the Roman law itself prescribes for the existence of Possession, and thus pointing out the precise modifications under which Detention operates as Possession." The second book deals with the acquisition of possession, the third with its loss; the fourth treats of the interdicts that act as remedies for the protection of possession; the fifth deals with possession in relation to legal rights that are separated from actual property (*juris quasi possessio*), such as personal and real easements and superficies (buildings). The last book deals with a subject which was necessary from Savigny's point of view to complete anything like exhaustive treatment of so important a branch of law as the doctrine of Possession. He says: "The theory of Possession has been discussed in the first five books of this work without any reference whatever to anything that may have been incorporated into the Roman law in modern times; and this method of inquiry is always necessary when we do not desire, by confounding the old law with the new, to misunderstand both together." It is important not to pass over the historical question, for "of all the important errors which are commonly entertained as to the Roman view of Possession, there is perhaps not one which has not also been raised in the Canon and German law." He goes on to point out as to the notion of Possession that, while in Roman law it referred only to property and *jura in re*, subsequently and especially by the Canon law it was extended to every possible right, including rights of personal status and obligations.¹ Thus the Roman law has been expanded to meet new objects. The forms by which Possession is protected were also modified in post-Roman times. The Spoliatory Suits in so far as they applied to prædial servitudes were a legitimate extension of the Roman law to meet cases that had not arisen when that law was in its prime. Savigny agrees with Mühlenbruch that these suits in so far as they were legitimate were an extension of the interdict *de Vi* to a third *mala fide* possessor.

It is in this final passage of his work that Savigny turns on the opponents of the new jurisprudence, and gladly cites in his favour Mühlenbruch, the

¹ I may note here that an analysis and summary of Savigny's latest work—that on *Obligations in Roman Law* (1851-3)—was published by Mr. Archibald Brown in 1872.

author of the *Doctrina Pandectarum*. "An empty cry is often raised against the endeavours of what is called the historical school, to clothe every right exclusively with Roman forms, and thereby to do injustice to the original inventions of practice, and to the development of modern scientific intelligence." This attack from first to last irritated, by its obvious injustice, Savigny, and it is with a cry of delight that he shows how Mühlenbruch shares his views as to Spoliatory Suits: "Could this author have been a prophetic disciple of the German historical school?" Savigny goes on to show that the "absurd and vexatious" possessory suit used in Germany, Italy, Spain, and France from the thirteenth century down to his own day, a suit called *Possessorium, summarium* or *summariissimum* (a suit in which he once acted as a judge), could not be fitted into any scientific evolution of Roman law. He adds: "In modern times undoubtedly legal rules have been adopted which were unknown to the Roman law; But the whole Roman theory is so far from being broken in upon by the above rules, that on the contrary they cannot be understood except by treating them as additions to the above theory [of possession], the validity of which is thereby clearly recognised." To-day in dealing with Savigny's work on Possession it would be wise to preface the study of it by a close perusal of Dr. Roby's lengthy treatment of the doctrine of Possession as understood in the times of the Antonines. Savigny would have appreciated the need for a full study of this elaborate portion of Dr. Roby's great work.

It is valuable to read what Savigny's pupil Guenoux said of his treatise on Possession in 1839:

On sait que dans ce traité, après avoir passé en revue les quarante-quatre ouvrages qui composent la littérature de cette partie du droit, l'auteur s'est livré à une étude profonde et originale des textes, et qu'à l'aide de la philologie et de l'histoire, il a établi sur cette matière si difficile des doctrines entièrement nouvelles, ou plutôt a retrouvé les doctrines des anciens jurisconsultes romains; mais ce qu'on ne sait pas, c'est qu'un travail aussi immense a été achevé en cinq mois. Cette heureuse fécondité prouve que malgré sa jeunesse Savigny ne s'était pas trop hâté de produire; et cette fécondité ne s'est pas tarie, parce que, semblable aux grands fleuves, il avait attendu pour couler que sa source fût pleine.

L'histoire et la science du droit ont certains problèmes qui sont éternellement livrés aux disputes des hommes, et dont il paraît impossible de donner une solution définitive. Dans la polémique à laquelle ces questions ont donné lieu, Savigny n'a pas montré moins de sagacité que de candeur et de bonne foi, en rétractant ses opinions dès-qu'un de ses adversaires en avançait une plus probable. Mais il est une foule de points où Savigny a eu la gloire de réunir tous les suffrages, et son livre, quoique purement théorique, a déjà eu la plus heureuse influence sur la pratique du droit en Allemagne, influence destinée à s'accroître, car pour la possession comme pour tant d'autres, le droit romain est souvent la raison écrite, la loi véritable, c'est à dire l'expression *des rapports nécessaires qui dérivent de la nature et des choses*.

This remarkable testimony to the gifts, the serious nature, and the abiding influence of Savigny written in 1839 might have been written to-day,

for the greatness of Savigny increases with the passing years. The vigour of his patriotism and his efforts on the behalf of the poor (as in the cholera outbreak of 1831) were scarcely less noticeable than his efforts as a teacher.

In 1804 Savigny married Fräulein Kunigunde Brentano, daughter of a Frankfort banker, a member of a family well known in German literature from the correspondence between her brother and sister, Clemens Brentano and Bettina von Arnim, with the poet Goethe. This marriage was an ideal union, since the wife, herself an orphan, had every thought in common with her husband. There were six children of the marriage. Two of them died in infancy. The only daughter married M. Constantin de Schinas, Minister of Education at Athens, where she died in 1835. She was full of brilliant promise, and her early death was the abiding grief of Savigny's life. It is said that the enormous work known as the *System of Modern Roman Law* was undertaken to help him to pass through this sorrow.

Shortly before his marriage Savigny had severed his connection with the University of Marburg, and, refusing tempting offers from the Universities of Heidelberg and Greifswald, he set out with his wife on a tour of research to certain famous libraries, to the libraries of Heidelberg, Stuttgart, Tübingen, Strasbourg, and Paris. In Paris he had the misfortune to lose (by robbery) all the material that he had collected through Germany. He called his old pupil Joseph Grimm to his aid, and with his help and the help of his wife and one of her sisters they conquered the abundant French manuscript material, including the unpublished and almost indecipherable letters of the great Cujas. In 1808 he took up for a year and a half professorial work at the University of Landshut. When he left for Berlin the grief of the students was unaffected. His sister-in-law Madame von Arnim, who was staying with him at the time of the change, wrote to Goethe:

Que Savigny soit savant tant qu'il voudra, la bonté de son caractère surpasse encore ses qualités les plus brillantes. Les étudiants l'adorent, ils sentent qu'ils perdent en lui un bienfaiteur. Les professeurs le chérissent également, surtout les théologiens. . . . Savigny avait donné une vie nouvelle à l'université, qu'il avait su réconcilier les professeurs ou du moins calmer leurs inimitiés, mais que son influence bienfaisante s'était fait surtout sentir aux étudiants dont il avait augmenté la liberté et l'indépendance. Je ne saurais vous exprimer le talent de Savigny à traiter avec la jeunesse. Les efforts, les progrès de ses élèves lui inspirent un véritable enthousiasme; il se sent heureux s'ils réussissent à traiter les sujets qu'il leur propose; il voudrait leur ouvrir le fond de son cœur; il s'occupe de leur sort, il pense à leur avenir, et leur trace la route qu'éclaire son zèle bienveillant. On peut dire de Savigny que l'innocence de sa jeunesse est devenue l'ange gardien de sa vie. Le fond de son caractère est d'aimer ceux auxquels il consacre toutes les forces de son esprit et de son âme, et n'est-ce pas là ce qui met le sceau à la véritable grandeur? La simplicité naïve avec laquelle sa science descend au niveau de chacun le rend doublement grand.¹

On the foundation of the University of Berlin (now celebrating its

¹ Goethe's *Briefwechsel mit einem Kinde*, vol. ii. pp. 171-188 (2nd ed.)

centenary) in 1810, one of the first fruits of the great educational campaign that sprang out of the disastrous field of Jena, Wilhelm von Humboldt, the head of the new Prussian educational system, offered Savigny the chair of law, which, chiefly from patriotic motives, he accepted. The jurist held this chair until 1842. It was his practice to lecture on the Pandects (excluding the law of succession) in the winter Semester and the Institutes in the summer Semester. He also lectured on Ulpian, Gaius, and the Prussian Landrecht. Among his pupils at Berlin were Hollyweg, Klenze, Göschen the editor of Gaius, Blume, Rudorff, Keller, Dirksen, Barkow, Böcking, and Puchta. He also sat on the University Appellate Tribunal known as the Spruch-Collegium, to which questions of law were referred for decision by other tribunals. At Berlin Savigny became an intimate friend and pupil of the great Niebuhr, whose mind and character so closely coincided with his own, and who pays him a just tribute in the preface to his History of Rome.

In 1811 Savigny was elected a member of the Berlin Academy, a precedent followed by most of the Academies of Europe in later years, and to this body he read papers on the Roman written contract, on the *Vocorian* law, on the lawsuit relating to the loan of money by Marcus Brutus to the town of Salamina, on the Protection of Infants and the *lex Plætoria*, on the Rights of Creditors under the old Roman law, on the History of the Nobility in Modern Europe.

In 1814 the jurist (who was then acting as law tutor to the Prince Royal of Prussia) issued a brief work entitled *De la Vocation de notre siècle pour la législation et la science du droit*, in which he closely and brilliantly criticised the proposed Civil Code as not in fact adopting, as it proposed to adopt, the principles of the Roman law at all. In 1817 he was given the honorary title of Geheimer Justiz-Rath in recognition of his work on the Council of State.

In 1819 he was appointed Counsellor to the Court of Revision and Cassation at Berlin which had been formed to take the place of the Courts at Düsseldorf and Coblenz. This practical work was of the greatest benefit to his juridical studies. A little later a nervous breakdown, the result probably of years of close work, became imminent, and in fact from 1822 to 1828 he was subject to a form of nervous illness that rendered at times all work impossible. M. Guenoux attributes to this illness the delay in the publication of the History of Roman Law in the Middle Ages.¹ The first volume appeared in 1815, but the sixth was not issued until 1831.

Savigny laid the greatest stress on the necessity of tracing the course of Roman law through the Middle Ages. He writes to M. Guenoux: "Ignorer ce que les siècles intermédiaires ont ajouté au droit romain primitif est absolument impossible, tout ce que nous apprennent nos professeurs et les livres modernes en est imbu." No student of, let us say, Bracton could doubt

¹ *Geschichte des römischen Rechts im Mittelalter* (6 vols. 8vo, Heidelberg, 1815-31). A second edition began to be issued from Heidelberg in 1834. The last and seventh volume appeared in 1851, with a preface dated in May of that year.

this, and Maitland in his brilliant papers on "The Beatitude of Seisin" (*Law Quarterly Review*, vol. iv.) has shown how the doctrine of possession in English law completely changed as the pressure, so to speak, of the Roman lawyers died away. Consequently Savigny determined to deal exhaustively with the history of Roman law in the Middle Ages. His great work falls into two parts: the period before and the period after the foundation of the School of Bologna about the year 1100. In the first two volumes he deals with the earlier period, first in general and then in detailed form. He begins with the sources of law and judicial organisation in Rome and the provinces in the fifth century. He follows this by treating the same themes in relation to the states that arose on the ruins of the Western Empire. In the second volume he deals with Roman law in the kingdoms of Burgundy, of the Visigoths, in the German Empire, in Saxon England, in the kingdom of the Ostrogoths, in Italy under the Greek domination and under the Pope and the Emperor in Lombardy. He finally shows the part played by the Church in preserving the Roman law. In the third volume he collects much material on the literature of Roman law after the foundation of the School of Bologna, and has an important chapter on the history of the European Universities. Indeed this general volume dealing with the history of Roman law from the twelfth century to the end of the Middle Ages is professedly a literary history of law, since Savigny found that such a history was indispensable for the comprehension of the evolution of the law. He says on this point:

Le but de toute composition historique est d'offrir une représentation complète et vivante du passé. Plus ce passé est éloigné, moins on a de moyens d'arriver à ce but. Ainsi l'on découvre un détail, mais on ne sait comment le rattacher à l'ensemble, ou il lui manque cette lumière qui éclaire un fait historique comme un fait contemporain. Si le but de l'histoire ne peut être atteint complètement, on ne doit rien négliger de ce qui nous en rapproche; l'on ne doit donc rejeter aucun détail comme peu important en lui-même, ou comme étranger à l'objet direct de notre étude.

So having given us the means of studying the legal literary history of the period, a bibliography of the subject (with full reference to the work of, amongst others, Johannes Andreæ of Bologna, Pastrengo the friend of Petrarch, Severinas, Trithemius, Diplovataccius, Johann Fichard, Benavidius, Pancirolus, Taisand: we miss in this place the name of Aymarus Rivallius, whose important history of the Civil Law in five books was published at Mainz in 1539¹), and treated of the Universities, he passes on to the legal sources possessed by the Glossators and considers at length their work. In the fourth volume we get the elaborate detail foreshadowed in the previous volume. Here we can read at large in more than five hundred closely printed pages of Irnerius, of the four famous jurisconsults of Bologna

¹ There is a copy of this work in the fine civil law section of Lincoln's Inn Library. Savigny gives a brief note on Rivallius in his fourth volume (pp. 256-7) and declares this work to be "remarquable, malgré ses défauts, comme le premier qui ait été fait sur l'histoire du droit."

(Bulgarus, Martinus, Jacobus, and Hugo), of Rogerius the pupil of Bulgarus, Placentinus, Johannes Bassianus, Pillius, and many other Glossators including the famous Vacarius and scarcely less famous Azo. In the middle of the thirteenth century a new and dismal era opened for the study of law: the text was swallowed up in detailed comment and the true treatise disappeared. Indeed the School of the Glossators was dead. In the fourteenth century fortunately a partial revival of scientific method came which carried the science of law on to the time of the Renaissance, when it was able to assert its place in the thought of the world. Savigny traces in detail this long movement, and illustrates each step with ample reference to the works of the jurists of the fourteenth and fifteenth centuries. In this work he threw open a field of research that will occupy jurists for centuries to come. Maitland's work in England is but a sample of what has to be done throughout Europe.

Savigny's work on *The Vocation of our Age for Legislation and Jurisprudence*, issued in 1814 and passing to a second edition in 1828, was a notable publication. It was neither more nor less than an attack on the system of the Code imposed upon Europe. Napoleon's Code he declares "served him as a bond the more to fetter nations: and for that reason it would be an object of terror and abomination to us, even had it possessed all the intrinsic excellence which it wants." He attacks the Code, however, chiefly from the point of view of a juridical thinker, since at the overthrow of Napoleon in 1814 his Code, which had been in force "in parts of Bavaria, Hesse Darmstadt, the Rhenish provinces of Prussia, the kingdom of Westphalia, Baden, the Hanseatic towns, and some other ultra-Rhenish provinces," was discarded by all Germany with the exception of the Rhenish provinces. The danger from a foreign Code no longer existed; but there still existed the danger of a Code at all. The eminent lawyer Thibaut of Heidelberg advocated the establishment of a German Code, and Savigny determined to throw his great weight in the other scale and restore a natural evolution of law. He attacked the demand for a Code first on the ground that the times being as they were, and the preparation for a Code (thanks to the paucity of great German jurists in the eighteenth century) inadequate and the language juridically undeveloped, it was not then practicable to construct a Code; and secondly on the ground that the three great existing Codes—the Code Napoléon, the Prussian Landrecht, and the Austrian Gesetzbuch—proved that in practice Codes were not successful. Savigny's attack on the Code Napoléon was just, though he admits that its form was embittered by patriotic feelings. He says:

The Revolution, then, had annihilated, together with the old constitution, a great part of the law; both, rather from a blind impulse against everything established, and with extravagant senseless expectation of an undefined future, than in the hope of any definite improvement. As soon as Napoleon had subjected everything to a military despotism, he greedily held fast that part of the revolution which

answered his purpose and prevented the return of the ancient constitution,—the rest, which all were now sick of, and which might have proved an obstacle to himself, was to disappear; only this was not altogether practicable, as the effects of the years that had elapsed upon the modes of thought, manners and feelings of the people, were not to be effaced. This half-return to the former state of tranquillity was certainly beneficial, and gave the Code, which was founded about this time, its principal tendency. But this return was the result of lassitude and satiety, not the victory of nobler thoughts and feelings; nor, indeed, would there have been any opening for such in that condition of public affairs which, to the plague of Europe, was preparing. This want of a sound basis is discernible in the discussions of the *Conseil d'État*, and must impress every attentive reader with a feeling of despondency. To this was now added the immediate influence of the political constitution. This, when the Code was framed, was, in theory, republican in the revolutionary sense; but all, in reality, inclined to the recently developed despotism. The elements of uncertainty and change were consequently mixed up with its fundamental principles. Thus, for example, in 1803, Napoleon himself, in the Council of State, pronounced those same Substitutions to be injurious, of a bad moral tendency and unreasonable, which were re-established in 1806, and, in 1807, adopted into the Code. But as regards the state of public feeling, a far worse consequence of this quick succession was, that the last, so often sworn to, object of belief and veneration was, in its turn, annihilated, and that expressions and forms came more and more frequently into collision with ideas, whereby, in the greater number, even the last remains of truth and moral consistency were necessarily extinguished. It would be difficult to imagine a state of public affairs more unfavourable for legislation than this.¹

Turning to the technical side of the Code, Savigny argues that the *Conseil d'État* could have, from its ignorance of general juridical doctrines, little influence on the Code. It was, as a matter of fact, the work of jurists who, so far as Roman law was concerned, necessarily based their work upon Pothier. Dupin declared that three-fourths of the Civil Code was literally extracted from his treatises. "A juridical literature in which he stands alone, and is almost revered and studied as the source, must, notwithstanding [the real value of Pothier], be pitiable." Savigny proceeds to eviscerate the framers of the Code, Bigot Preameneu, Portalis, and Maleville. Certainly they were not supremely intelligent jurists. The results of their work were bad in the extreme. In the selection of subjects "the most palpable defects are to be found by wholesale." But worse was to follow. "Far more important in this respect, and much more difficult in itself, is the selection of rules on the subjects actually treated of; consequently the finding of rules, by which particular cases are to be governed in future. Here the object was to master the leading principles, on which all certainty and efficacy in juridical matters depend, and of which the Romans afford us so striking an example. In this point of view, however, the French work presents a melancholy spectacle." The fundamental and precise notions—

¹ I use the translation made from the 1828 edition by Mr. Abraham Hayward in 1831. (London: printed but not for sale.) A copy, here used, is in the Acton Library at Cambridge (C. 48. 929). There is another copy in the Middle Temple Library.

the rights of things and of obligations—upon which the Roman law of Property depends are in the Code vague and ill understood, and this leads to a confusion of ideas which in the form of a Code is dangerous to the public. Last, Savigny attacks the provisions in the Code for dealing with cases that are not in fact covered by a precise section of the Code. It was not possible to regard the rules dealing with such cases as organic developments out of the Code—with which we may compare, though Savigny does not give the parallel, the growth of the English common law to meet new cases—since the Code itself had no organic unity. The Code is only a mechanical mixture of the Revolution and pre-Revolution laws, and the mixture is not even a logical whole, a formal unity that might be logically developed to meet new cases. Consequently the supplemental rules had to be supplied from outside sources, such as (that vague thing) the law of nature, the Roman law and local pre-existing law, and the general theory of law. This introduction of an abrogated law into the Cour de Cassation is a real evil. A practice of the Courts could grow up, but no real juridical growth. The rules could indeed be applied at the tyrannical discretion of the judges. This indictment of the French Code, if we except the political note at the beginning, is effective in the extreme, and should be considered in every step towards codification. Before considering his general notion of legal reform it will be well to say something of Savigny's criticism of the German and Austrian Codes.

Savigny's criticism of the Prussian Landrecht designed by Frederick II. in 1746 is not less penetrating, though his natural if somewhat unjudicial hatred of France and all her works induces him to attribute to the Prussian jurists a far nobler outlook than that which inspired Napoleon and the unhappy framers of the Code. We may doubt if Suárez was a greater man than Pothier, or Volkmar (or Pachaly) than Portalis, but in any event Savigny declares that if "we regard the composition of the Landrecht, it confirms my opinion, that no Code should be undertaken at the present time." Frederick II. designed a Code that should abolish judge-made law altogether; but, in fact, the Landrecht in its latest form gave the judge full powers of interpretation. But still this was, after all, only for particular cases. "With the Romans all depends on the jurist, by his thorough mastery of the system, being placed in a condition to find the law for every case that may arise. This is effected by the precise individual perception of particular legal relations, as well as by the thorough knowledge of the leading principles, their connection and subordination; and where, with them, we find law cases in the most restricted application, they notwithstanding constantly serve as the embodied expression of the general principle." This was not the case with the Landrecht, the provisions of which "neither reach the height of universal leading principles, nor the distinctness of individuality, but hang wavering between the two, whilst the Romans possess both in their natural connection." Savigny goes on to criticise the German language, "which,

generally speaking, is not juridically formed, and least of all for legislation." The French language, he adds, has a great advantage in this respect: that it had not been better used "is accounted for by the low state of knowledge" in France. The Austrian *Gesetzbuch* was begun in 1753; by 1767 the groundwork of the Code, "a manuscript work of eight large folios, mostly extracted from the commentators on the Roman law," was complete. This was abstracted by Horten, digested into code form by Martini, published, submitted to the provincial authorities and the Universities, and, slightly revised, issued as the *Gesetzbuch* in three parts, covering 561 widely printed pages. The Empress Maria Theresa directed the draughtsmen to employ "natural equity" as well as Roman law. In fact there was no attempt to cover all particular cases. The notions of legal relations were defined, and the most general rules laid down. Savigny considered these notions as too general and undefined, and often based on an imperfect appreciation of the Roman authorities. The Roman clarity of definition is absent. Moreover, the practical rules of the *Gesetzbuch* are as incapable as the rules of the Code Napoléon of meeting particular cases. The *Gesetzbuch* falls back for the solution of particular cases on cases analogous to those provided for, and on "natural law"; the principle carries one but a short way, and the use of "natural law" is "fraught with danger to the administration of justice." The *Gesetzbuch*, like the Code and the *Landrecht*, therefore confirms Savigny's argument "that the present time has no aptitude for the undertaking of a Code." The unsuccess of three such efforts shows that "there must be some unsurmountable obstacles in the juridical state of the whole age."

What then, asks Savigny, are we to do when there are no Codes? He would hold to the "same mixed system of common law and provincial law, which formerly prevailed throughout the whole of Germany . . . provided [that] jurisprudence does what it ought to do, and what can only be done by means of it." We have inherited "an immense mass of juridical notions and theories. . . . At present, we do not possess and master this matter, but are controlled and mastered by it, whether we will or not. This is the ground of all the complaints of the present state of our law, which I admit to be well founded: this, also, is the sole cause of the demand for Codes." Savigny adopts the Hegelian position: "It is impossible to annihilate the impressions and modes of thought of the jurists now living,—impossible to change completely the nature of existing legal relations; and on this twofold impossibility rests the indissoluble organic connection of generations and ages; between which, development only, not absolute end and absolute beginning, is conceivable." Savigny with a brilliant flash of juridical insight turns the indestructibility of legal notions to permanent gain. He says: "There is consequently no mode of avoiding this overruling influence of the existing matter; it will be injurious to us so long as we ignorantly submit to it; but beneficial if we oppose to it

a vivid creative energy,—obtain the mastery over it by a thorough grounding in history, and thus appropriate to ourselves the whole intellectual wealth of preceding generations." In any other process the law may lose its consciousness of nationality, and only through history "can a lively connection with the primitive state of the people be kept up; and the loss of this connection must take away from every people the best part of its spiritual life." Savigny goes on to say that the object of the strict historical method of jurisprudence "is to trace every established system to its root, and thus discover an organic principle, whereby that which still has life may be separated from that which is lifeless and only belongs to history." The importance of Roman law is that "by reason of its high state of cultivation" it serves as a pattern for the labours of the modern jurist. The importance of the local or customary law is that "it is directly and popularly connected with us." The modifications of these two primitive systems are important as showing how both Roman law and local law have varied under the stress of actual needs and the application of legal theory. Roman law must be grappled with at the root; we must enter into the minds of the Roman jurists if we are to appreciate it and apply it to modern uses. Do not be afraid because the text-books are as yet imperfect: "Everything which Thibaut here says of the uncertainty of our text-books is equally applicable to the Scriptures. In these, also, the critic will never find an end; but he who, on the whole, is able to find nourishment and joy in them, will certainly not be troubled upon that account." Savigny's appreciation of the spiritual weakness of the Higher Criticism of the Bible then growing into a force of negation is an important phase of his high and spiritual nature.

Savigny, with his habitually long vision, insisted that "this diffusion of legal science ought to take place, not only amongst the jurists of the learned class, the teachers and writers, but even amongst the practical lawyers." He demands the approximation of theory and practice, and applauds a proposal for free communication between the Faculties of Law and the Courts. Mr. Hayward in a note (p. 149) points out that "from the time of Maximilian, the immediate predecessor of Charles V., the Law Faculties, consisting of the Professors of the German Universities, have constituted Courts of Appeal in the last resort. The appellants, I believe, may select any University they please; for instance, a case decided in Hanover may be sent to a Prussian University." It will be remembered that Savigny's father sat on one of these University Courts. But Savigny says that in his time these University Courts had become even more mechanical than the regular Courts.

Savigny having shown how the texts or legal authorities can be based "on a profound and comprehensive science," and how the judges may be made efficient, proceeds to deal with the third necessity of an efficient legal system, good procedure. To reform procedure, he says, we must have recourse to the

legislature. The legal system so established would moreover derive great assistance from the legislature, which would settle disputed points of law (acting through Orders of Court) and record old customs that have received validity in practice. Then at last the historical matter of law will be transformed into national wealth, and the nation will possess a national system of its own and not "a feeble imitation of the Roman system." Savigny goes on to ask what is to be done under these circumstances with the Landrecht and the Gesetzbuch. It seemed clear that no "real, living jurisprudence" could be founded upon any one of the three Codes or upon the then proposed new German Code. The study of law must go on as if the Codes did not exist; the study, that is, of both the common law and the provincial laws; it must go on in the Universities, and there must be intimate intercourse between all the German Universities.

No one can read Savigny's attack on the Code movement of his age without feeling the immense weight that is due to his opinions. Step by step he urges an unanswerable argument and lays the foundation of the only true system of practical jurisprudence. To-day this work is of peculiar value and interest, for on the one hand we have England, a country that has in fact followed, unconsciously enough but in most exact detail, the lines of development suggested by Savigny, and on the other hand we have the rest of Europe under the dominance of that very system of Codes denounced by the greatest jurist that Europe has produced. Who is right? Savigny, England, and the Anglo-Saxon nations throughout the world, or Napoleon and his Europe?

Savigny's Preface, written in September 1839, to his great work on *The System of the Modern Roman Law* (in eight volumes, five published in 1840-1 and the rest in 1847-9) amplifies with even a broader outlook the views expressed in the first edition of *The Vocation of our Age for Legislation and Jurisprudence* (1814) and repeated in the second edition (1828) of that finely critical essay. The material for the work on *Modern Roman Law* had been "gradually collected and worked up in the courses of instruction" delivered by Savigny for a period of forty years, and the work itself is his ripe and incomparable judgment on the subject. Pleading as he does for "the continuous cultivation" of the science of law, he feels the danger of the accumulation of material.

To prevent this danger we must desire that from time to time the whole mass of that, which has been handed down to us, should be newly examined, brought into doubt, questioned as to its origin. This will be done by placing ourselves artificially in the position of having to impart the material transmitted, to one unskilled, doubting, controverting. The fitting spirit for such a testing work is one of intellectual freedom, independence of all authority; in order, however, that this sense of freedom may not degenerate into arrogance, there must step in, the natural fruit of an unprejudiced consideration of the narrowness of our own powers, that wholesome feeling of humility which can alone render that freedom of view fruitful of performances of our own. From two wholly opposite standpoints, we are thus

directed to one and the same need in our science. It may be described as a periodically recurring examination of the work accomplished by our predecessors, for the purpose of removing the spurious, but of appropriating to ourselves the true as a lasting possession, which will place us in the condition, according to the measure of our powers in the solution of the common problem, of coming nearer to the final aim. To institute such an examination for the point of time, in which we actually are, is the object of the present work.

He goes on to defend "the historical school" (of which he was certainly the most distinguished representative) from the unjust criticism to which it had been subjected. The aim of that school was not (and one may add is not, for to-day the historical school is one of the most important agents of thought in Europe) to "subject the present to the government of the past." The historical view of legal science (and we may say of any science) "consists in the uniform recognition of the value and the independence of each age, and it merely ascribes the greatest weight to the recognition of the living connection which knits the present to the past, and without the recognition of which we recognise merely the external appearance, but do not grasp the inner nature, of the legal condition of the present."

Savigny's object was certainly not to assign an "immoderate mastery" to Roman law, but he claims that a thorough knowledge of that law is indispensable for a comprehension of existing legal conditions. The natural unity between the theory and the practice of law finds its expression in the Roman law, and the study of that law can do much to avoid the disastrous divergence of the practical and the theoretical. But to make the Roman law produce this result we must turn, not to summaries or general principles, but to the writings of the Roman jurists. Such a study will eliminate from law subjective and arbitrary aberrations, and give to law new life even where it exists in the form of a Code. "This is markedly shown by the example of the modern French jurists who, often in a very judicious manner, illustrate and complete their Code from the Roman law." Even in the case of the Prussian Code, if there could be at least a partial re-establishment of "the dissolved connection with the literature of the common law, the result now could be nothing but the arising of a beneficial influence upon practice, and the mischiefs, so sensibly felt at an earlier time, would certainly not recur." The effort to employ Roman law "constantly as a means of culture for our own legal condition" is no depreciation of "our time and our nation," for in view of the enormous accumulation of material we have a greater task than lay before the Roman jurists and we may rightly use their methods. "When we shall have been taught to handle the matter of the law presented to us with the same freedom and mastery as astonishes us in the Romans, then we may dispense with them as models and hand them over to the grateful commemoration of history." Till then we must use a means of culture that we are incapable at present of creating.

With such views in mind, Savigny proceeds to his critical and systematic

treatment of Roman private law as it existed in his time. He searches out and rules out all that is dead in Roman law, and then he proceeds to demonstrate the great and living unity of what remains. "In the richness of living reality, all jural relations form a systematic whole." His business is to demonstrate this deep and fundamental relationship, which is apt to disappear when particular fields of law are momentarily in view. The fact of this relationship causes him to give in 1839 an "entirely different shape" to the doctrine of Possession from that presented by him in 1803. For this we must get back to the old jurists. From them we may secure "a vitalising and enriching of our own juristic thought obtainable in no other way." Savigny says that the work he here performs he would have performed more thoroughly had he begun it in his earlier years. He would have checked his system by exegesis beginning from the Glossators and on through the French school, and by practical examples also derived from the authors of the numerous *Consilia responsa*, etc., also, beginning from the Glossators. In this way his system would be checked in detail, and he suggests that some successors of his might undertake this work and give it literary completeness. With some pathos he suggests that it might be done piece by piece. He does not anticipate the coming of giants, of Cujas or another. So he gives his work to the world. The first volume deals with the problem before him, with the nature of law sources in general, with the sources of the modern Roman law, with the interpretation of written laws. The second book deals entirely with jural relations, and the first chapter treats of the nature and kinds of the jural relations. Up to this point we have a translation by Mr. William Holloway, formerly a judge of the Madras High Court. This was issued at Madras in 1807. The eighth volume of the work, a complete treatise on the conflict of laws and private international law, was translated by Mr. William Guthrie of the Scots Bar and published in 1869 (2nd ed. 1880) by Messrs. Clark of Edinburgh. In 1884 Sir William (then Mr.) Rattigan published a translation of the residue of the second book, in which are elaborately discussed "persons as subjects of jural relations." This translation exhibits the thoroughness of Savigny's investigations and his power of systematic grouping of material. For the purposes of this article it is not possible or desirable to discuss the details of a work such as this, with its close investigation into the facts and doctrine of legal capacity, of *Capitis Deminutio* and juristical persons, or as we should say artificial persons (such as corporations) possessing jural relations.

The pressure of public judicial and diplomatic work had long burdened the jurist. Dr. Reddie, in his very admirable volume entitled *Historical Notices of the Roman Law and of the Recent Progress of its Study in Germany*, published at Edinburgh in 1826, a work that traces in valuable detail, based on personal knowledge, the universal activity of the study of law throughout Central Europe at this date, says of Savigny: "A man of genius, he is not only a celebrated professor and judge, but a profound statesman. . . .

Unfortunately for the study and the science in general, the time of von Savigny is too much occupied with the discussion of petty disputes in a kingdom, the attention of whose government is almost entirely directed towards military affairs, and where his labours, however highly valued, can be of little service to mankind at large" (pp. 111-114). It is certain that Savigny did not look at his judicial work in this light. He was descended from a family of soldiers, diplomatists, and lawyers, his son was an eminent diplomatist, and he continually dwells on the need for the closest touch between the theory and the practice of law. As a judge he certainly gave practical law something, but as a jurist there can be little doubt that he gained immense power from it. It kept his theory of law alive, and made the jurist feel in the most vivid sense the reality and the personal importance of his speculations. So important did he regard this class of work that in 1842 he resigned his chair at the University of Berlin and became the Prussian Minister of Justice, a post which he filled with rare ability until the year 1848, when the wave of revolution passed across Europe. In that year he retired and set to work to revise his publications and papers. Fortunately he was allowed long leisure in which to fulfil this important work of revision. Many of his papers are to be found in the *Zeitschrift für historische Rechtswissenschaft*, the journal for historical jurisprudence which he founded with the help of Eichhorn and Göschen in 1815, and superintended for many years.¹ Before the great jurist died at Berlin on October 25, 1861, in his eighty-third year (his devoted wife his helper to the last), he could look back over a long vista of accomplished work, and could believe that the future of his beloved science was assured.

It is not possible even yet, half a century after the death of Savigny, to indicate fully his work in the history of the evolution of law, his place among the great jurists of the world. The depository, so to speak, of so many centuries of juristic activity, the forerunner of detailed juristic investigation of so manifold a character, it is perhaps as easy to undervalue as to overvalue his services to a science that mysteriously superintends the health and welfare of the social world. For my own part (but I write with hesitation as one who dares not claim to have entered in any real sense into even a minute portion of the fruits of his cheerfully titanic labours), for my own part I should be tempted to call him the Newton or the Darwin of the science of law. His achievements resemble the achievements of both of these mighty men. He found, as Newton found, a world of phenomena, in his case of juristic phenomena, and he wrestled with it in the true hardihood of the Renaissance through the dark night until the Spirit of the Law cried out, "Let me go, for

¹ In October 1850, on the occasion of the universal congratulations upon the completion of the fiftieth year of his doctorate, he issued as a thank-offering and memorial a collection of all the detached papers he had written in that period. The volume was entitled *Vermischte Schriften*. The only omission from it was a review of Glück's *Intestaterbfolge*, which appeared in 1804 in the *Jenaische Literaturzeitung*. (See *Law Magazine and Review*, May 1863.)

the day breaketh." It was reserved for Savigny to bring the daylight of the Renaissance to the science of law. He showed us that law itself is subject to law, that it is no arbitrary expression of the will of a law-giver, but is itself a thing obedient to a cosmic process. To show that law is itself the expression of a juristic process that runs through the ages was in itself an achievement of the highest order; but to go on to trace, as Savigny traced, what we may call the natural history of law, to trace its organic growth as a living thing, evolving with the evolutions of races and kingdoms and tongues, was a still greater triumph. When we think of the apparently chaotic mass of material into which Savigny introduced an evolutionary law, or, rather, indicated the processes by which, operating through and in this material, juristic forces adjusted themselves to the needs of successive ages, it is difficult to resist the decision that he stands in the forefront of European thinkers. It is true that his guiding star in his investigations and reductions was the Roman law, but he himself fully realised the importance of other systems of law, the common laws or general and particular customs of European nations, in arriving at general results. But while individual nations had their respective systems of common law, it must be remembered that, down to the Renaissance at any rate, Roman law was the common law of all Europe, a general system of law upon which local systems were more or less successfully grafted. To trace the natural history of Roman law in Europe was the only possible method of arriving at the secret that underlay the whole evolution of law. When once the secret was disclosed, then it was time enough for Savigny himself and his successors to retrace the ground, to reinvestigate sources, to turn the newly discovered processes on those sources, and so to bring into the field of juristic science material of every kind that, until then, had seemed beyond the control or operation of any general law of evolution.

There is no need to claim too much for Savigny. As we have seen, he was not the inventor of the historic method, nor can he claim to have carried that method to its scientific height. Newton and Darwin entered into the ideas and labours of their predecessors, and their supreme conceptions have certainly been applied with a thoroughness that would possibly have astonished the masters themselves. So it was and has been with Savigny. Of his forerunners we have seen something; and even while he was toiling, Semester by Semester, in the congenial work of teaching and judging at Berlin, his fellow-workers and pupils were applying his methods and were methodising material to his hand. And his and their successors in Germany and England and France have gone far. His friend Niebuhr in 1816 discovered in the chapter library at Verona the priceless palimpsest manuscript of the Institutes of Gaius, the work on which the Institutes of Justinian were based. In 1820 Savigny's pupil Göschen published the first edition of this manuscript. Another pupil, Blume, obtained some further readings from this almost indecipherable palimpsest in 1822-3, and these

were included in Göschen's second edition of 1824. The study of this manuscript has gone on until quite recently. Dr. Roby tells us that "Wilhelm Studemund in 1866-68 made a fresh copy of the MS., containing much that had not been previously read, and he published a kind of *facsimile* in 1874, and in conjunction with Paul Krüger a very careful and convenient edition in 1877. In 1878 and 1883 Studemund re-examined the MS., and thus obtained additions and corrections of some importance, which were published in subsequent editions of his and P. Krüger's book." Here, then, was one line of investigation worked out that must have been after the very heart of the master. Another investigation, of perhaps even greater importance from the point of view of the history of evolution of law, has been the work, one might almost say the life-work, of that eminent English scholar Dr. H. J. Roby in reconstructing, with an infinitude of labour that recalls the toil of Cujas and of Savigny, Roman Private Law as it existed in the times of Cicero and of the Antonines. It is a marvellous piece of work, and gives us substantially, if not actually clear of "Byzantine modifications," Roman Private Law as it stood at the time of its highest development (say 161 to 228 A.D.). Savigny would have been the first to recognise the supreme importance of establishing this basis from which to trace the long centuries of modification, down even to the law of Holland or Scotland, Ceylon, Egypt or the Cape to-day; and he, too, would have been glad to know of the substantial assistance afforded to Dr. Roby by German scholars, and probably would have enjoyed some of Dr. Roby's not unkindly criticism of certain modern German critical methods. Beside Roby's work must be placed the tireless labours of the immortal Mommsen and his school in unravelling the texts of "law-books, authors, and inscriptions." No doubt vast fields lie open for future scholars in the period behind the Antonines, though much work has already been done in those dark ages. And, again, the field of Roman law in the Middle Ages calls for workers. Maitland's brilliant treatment of Bracton shows how much remains to be done to bring into cultivation the immense field over which Savigny cast his measuring-rod. This is not the place in which even to indicate the area of work, or to mention the work now in progress. But that work and the appreciation of its intensity and its range by great modern scholars show how thorough and how sound were the principles that Savigny laid down. His actual work was titanic, but it is plain enough (now that he has given us the guiding principle) that he but threw open an almost illimitable domain of investigation. As it was, with Newton and Darwin, so was it with Savigny.

Sometimes it has caused wonder that a man of such vast intellectual powers should have devoted to law, and Roman law, gifts that might have seemed intended for mankind; for mankind, that is, in some practical and immediate way. The answer, however, is surely not far to seek. Man cannot live by bread alone; and even breadwinners cast their bread upon

the waters that it may return after many days. A lawyer, even a jurist, does not appeal to the popular mind. To be a Napoleon does so appeal. Yet probably Napoleon's greatest work was one that brought Savigny, so far as intellect clashes with intellect, into direct conflict with the victor of Jena. The Code Napoléon was attacked by Savigny with a vigour, a swiftness, and a certitude worthy of the great captain himself. And Savigny's pungent criticism stands to this day. In so far as Napoleon's Code has survived and permeated Europe it has tended to diminish the efficiency of law as a thing that grows with a people's growth and reacts on their efficiency. Napoleon's successful enemy, England, strenuously maintained that identical system of legal development advocated by Savigny, with the result that we are approaching an age when codification slowly becomes possible in the sense anticipated by the jurist of Berlin. This illustration of the relation of a jurist to daily life is not without its value. The jurist is greater than the legislator. His function is so to lay down general laws of juridical development that nations in the course of remedial legislation may have a guide which will show them how to adapt that legislation to the needs of the people; how to evolve it from a living legal system; and how to make it stage by stage an expression of the life of the people, and at the same time a guiding force that will lead not only individual peoples but all nations to adopt ever higher standards of conduct, ever closer and closer approximations to the divine laws of righteousness and equity that stand like Platonic patterns towards which the nations turn their eyes. If this is the function of the jurist, then he stands among the great benefactors of the world, and few will doubt that Savigny, whose soul was a very pattern of clarity and charity, will remain a bright particular star as we move farther away from the great nineteenth century and watch through Time's impartial glass the fixed stars that brood over it and by which we guide our fate. The motto of Savigny's family, *Non Mihi sed Aliis*, had had a real meaning in the lives of his ancestors. In the case of Savigny himself the words reveal his character, his ideals and his daily task. One of the very greatest of the jurists, he saw underlying all law the law of love.

EMPLOYERS, EMPLOYEES, AND ACCIDENTS.¹

[Contributed by SIR JOHN GRAY HIEL.]

At the last meeting of this Association held at Budapest in 1908, Dr. Baumgarten and Dr. Géza Pap read valuable papers entitled respectively "A Comparative View of the Laws relating to Workmen's Compensation" and "The International Aspect of the Workmen's Insurance." These papers dealt principally with the rights of foreign workmen or their dependents, whether the accident happened at home or abroad, against home employers, or against home insurance funds (where the latter are substituted for employers in regard to liability), and with the desirability of adopting international agreements to provide equal treatment for home and foreign employees alike. No doubt such agreements are desirable, and progress has since been made in this direction; but it is not upon that question that I wish to address you.

I desire to make a few observations upon the divergences existing in the laws of different countries upon the general subject of what is known as Workmen's Compensation; and as those laws cannot be looked upon as having yet assumed their final form, I propose to make a few suggestions upon what appear to me to be imperfections in some of them, and to propose what appear to me some improvements which one nation might borrow from the legislation of another.

As the learned authors of the two papers point out, there is a wide diversity in the different laws in question. It is observable as regards the nature of the special enactments recently passed in the majority of countries making provision for injuries due to accidents happening to employees. It is also observable as regards the laws existing in all countries prior to those enactments.

Before the passing of the recent legislation the law of France and of many continental nations made the employer liable for the negligence of one of his employees which caused injury to another employee, in the same manner as if the latter were a stranger; and did not admit the defences of common employment and assumption of risk by the employee, which were so unfortunately (as I think) admitted by British Courts, and by the Courts of the United States.

¹ Read at a Conference of the International Law Association, Guildhall, London, August 3, 1910.

The special enactments referred to have been adopted by nearly all the chief European countries, and by nearly all the British possessions, but only very partially and to a very limited extent in the United States.

The justification put forward for the new laws is that it is expedient in the public interest to throw the risk of accidents upon the trade in which they occur, and that the employer can recoup himself for the cost incurred by him by raising the price of his productions, and by reducing wages.

How far this reimbursement is possible is an economic question which I am incompetent to determine. But the amount involved must be extremely large. During the year 1908 there was paid in compensation to injured employees and their representatives in the United Kingdom, under the Act of 1906, more than £2,000,000 (Home Office: Workmen's Compensation, Statistics of Compensation, 1909).

The returns are not exhaustive: the pending claims under the Acts of 1897 and 1900, the legal costs of the employers, and the payments made under "contracting out" schemes certified by the Registrar of Friendly Societies under the Act of 1906 are not included. Nor can the cost of the accidents of one year be ascertained without including an estimate for payments to be made in future years arising out of these accidents. Not until the lapse of many years can a fairly average annual cost be arrived at. And it is obvious that to arrive at the real cost of the Act to employers, it is not the amounts paid in compensation by insurance companies with which the employers insure their risk which should be considered, but the premiums paid by the employer for the insurance. The latter must necessarily include not only the compensation paid, but the expense of working the insurance business, the remuneration paid to the officers and agents of the insurance companies for obtaining the contracts of insurance, for inquiring into the claims made, settling or defending them, fees to the medical men and lawyers employed by them, and lastly the profit of the companies, without providing for which they would not grant the policies.

The total cost to British employers in 1908 must therefore have greatly exceeded £2,000,000. The cost to the employers in all countries which have adopted this kind of legislation must then have been enormous.

It may be of interest to mention that in 1902 in Germany, nearly 20,000,000 persons came under the Accident Insurance Laws, and the total cost of working was nearly £7,000,000 (Home Office Report, Workmen's Compensation, vol. iii., Supplementary Appendix).

It is now useless to inquire whether taking the whole matter into consideration, including the effect on employees themselves, the policy of the special enactments is wise. It is so well established and so widely spread that it must be accepted. It must, however, be admitted that whatever good it may effect it is attended by certain evils.

What should be the main objects aimed at by these laws?

The thing most to be desired is the avoidance of accidents. Efforts are made in this direction in nearly all countries by statutory or Government regulations, of a nature altogether apart from the recent laws, which must have met with a great deal of success. But I doubt if the special enactments which I am considering have had any effect of this kind, except so far as they have tended to exclude from employment persons in such a physical condition as to make them specially liable to accident; which is a tendency against the public interest, as it restricts the opportunities of the wage-earning class.

But putting aside the question of prevention, and dealing only with the state of affairs existing after an accident has occurred, the chief object should be where practicable to restore the health and strength of the injured person as rapidly as possible. This end is not furthered in any way whatever by the British Workmen's Compensation Act of 1906, nor by the Acts relating to the same subject in force in any of the British possessions, nor by the various Acts relating to the liability of employers for accidents caused by defects in appliances or negligence of superintendents, existing in certain of the United States of America. Healing depends chiefly, as medical men tell us, upon first treatment, but all these Acts leave the sufferers to their own devices. The injured person very often through ignorance or neglect allows results to flow from the injury which are not the necessary result of it.¹

None of these Acts entitles the employee to any provision of medical aid. Nor does any of them entitle the employer to interfere. And yet the latter is generally made to pay for the aggravation of the injury attributable to ignorance or neglect; although in theory such result is not due to the accident.

In Germany, on the other hand, medical treatment is provided by the insurance fund, and is in effect compulsory on the sufferer.

The next object should be to provide machinery to ensure the claim being dealt with as rapidly and cheaply as possible. To this end the great point is to obtain an immediate and absolutely impartial medical investigation, the result of which shall be accepted as binding on the parties, at any rate until displaced by evidence to the contrary. If the report made by the impartial investigator be accepted as unquestionable, a vast amount of legal and medical fees would be saved, and great promptitude of decision obtained. In this country the inquiry is postponed until the claim for compensation comes before the Court, when doctors, who too often come to look upon themselves as advocates, are produced as witnesses one against another, and between their conflicting opinions the truth becomes very difficult for the tribunal to ascertain, whilst very great expense is incurred in obtaining the evidence.

¹ A very common case is that of an abrasion of the skin, which for want of attention, even of cleanliness, brings about blood poisoning.

As impartial investigators eminent medical men of the highest standing must be selected, and a sufficient remuneration must be paid, for men of this stamp cannot be obtained at a low rate of pay.

It would be of great advantage to all concerned if it were further provided that the medical men so appointed should continue to treat the sufferers as their patients, so as to be able to assist the recovery of the latter, and to report upon their condition from time to time.

The points in which the Acts of different countries vary from one another include the following :

1. Whether the employer is personally liable to the employee, or only bound to provide or contribute to the cost of an insurance fund out of which payment is to be made.

2. Whether, when the employer is liable, his liability is for accidents however caused, or only for those due to negligence of the superintendent appointed by him or by his authority, or to the defective state of the appliances used in the work.

3. The occupations to which the enactments relate.

4. The maximum amount of annual earnings which exclude an employee from the benefit of the Act.

5. The acts of the employee in relation to the accident which disentitle him to establish his claim.

6. The extent of the claim of the employee or his dependents. In this are included—

(a) In case of temporary disablement the right to medical treatment, nursing, etc., and the duty to submit to the same; the period after the accident at which the first payment having reference to wages becomes due; the proportion which the payment bears to wages; the minimum and maximum limits both as to amount and as to the period for which they are to be continued; and special provisions as to persons under age.

(b) In case of permanent disablement, whether partial or total, the enactments differ as to the like questions, and also as to whether a certain value or scale of compensation should be applied to the loss of a particular part of the body of the employee, such as a leg, an arm, or an eye.

7. In case of death—

(a) The allowance for funeral expenses.

(b) The rights of the dependents—what relations are to be considered as such, and in what order, and whether illegitimate relations are to be included, and to what extent—the mode of arriving at the amount payable, whether by lump sum or by annuity—the period for which the latter is to last, and the minimum and maximum limits as to amount.

8. How the enactment is to be administered, *e.g.*,

- (a) How far Government or other officials acting independently of the employer and employee are to intervene in the administration.
 - (b) Whether questions as to the interpretation of the enactments and the rights of the parties under them are to be decided by a special tribunal, or by the ordinary Courts of the country concerned.
 - (c) What powers of appeal are to be given.
 - (d) How the expenses involved in the settlement of these questions are to be borne.
9. Whether sickness and disease not arising from accident are to be provided for.
10. The bearing of the enactment upon the limit of liability of ship-owners for loss of life or personal injury.
11. Whether the employee should be entitled to enforce a claim against a foreign shipowner residing out of the jurisdiction of the Courts of the country where the employee resides, by arrest of his ship, situate for the time being within the jurisdiction.
12. Whether the employee should be entitled to contract with the employer, under any and what circumstances, not to claim the benefits of the enactment.

The most important in principle of the above differences is that which relates to the question whether the employer should be personally liable to the employee, or only bound to provide or contribute to insurance sufficient to cover the risk. It is true that for some practical purposes this is less material both to employer and employee than would at first sight appear. On the one hand the employer can, and generally does, protect himself by insuring with solvent insurance companies, or by contribution on the mutual system with other employers engaged in the same trade, and thus he is saved from ruinous claims. On the other hand, by these means the employee is made sure of receiving his compensation, even if the special enactment does not, as it generally does, give him a direct right of recourse against the insurers.

The enactments of some countries give the employer the alternative of personal liability or insurance. This, however, from the same point of view is not very material.

But the plan of throwing the whole risk upon insurance, especially if carried out by contributions by all parties interested, and especially also if claims are dealt with, and the law administered by those parties jointly acting through their respective representatives, possesses some great advantages. It removes the sense of injustice to the employer created by making him alone responsible for what he cannot by any care avoid. It diminishes the risk of fraudulent and exaggerated claims, which is so unfortunate an accompaniment of the system of personal liability. It generally enables all questions which may arise to be decided without undue delay or expense.

Furthermore, it affords a convenient opportunity of providing by the same insurance for disablement or death of the employee caused by disease, or other natural decay. If such a system is adopted it would avoid the necessity of inquiring into what constitutes an accident, and whether the accident arises out of the employment, both of which questions are sometimes very difficult to determine. And if, as would be a desirable part of the scheme, the employee contributes to the insurance fund, the result would be to interest him in avoiding risk to his fellows, and in preventing unfounded and exaggerated claims from being preferred by them.

It appears to me that this is a system which is worthy of universal acceptance. But waiting for its adoption may be like waiting for the millennium; so I will turn to points more likely to meet with a favourable reception.

Upon the question whether the liability of the employer should be restricted to accidents due to negligence of his superintendent, and defective state of the appliances, or should extend to accidents, however caused, I need only observe that the former principle was adopted by the British Employers' Liability Act, 1880, and was followed after some years in several of the British possessions, and several of the States of the American Union. But in the British possessions, as well as in continental countries, it is rapidly giving way to the principle of liability for all accidents, and the like development in the United States appears only to be hindered by constitutional difficulties.

Many of the matters of difference in the special enactments of the various countries rest upon solid grounds of reason, based upon the different rate of wages, cost of living, etc.; and as to such matters uniformity cannot be expected, and is not indeed desirable. But there are peculiarities in some of these laws which might be wisely adopted generally.

The special enactments differ as to the occupations to which they apply. The general tendency has been to begin with the more dangerous occupations, and gradually to adopt the less dangerous, until Great Britain, and I believe also Switzerland, have included all ordinary employments. Owing to democratic pressure all other countries will I think eventually follow the example of these.

Employees earning more than a certain fixed amount (which may vary in different countries in accordance with the rate of wages, cost of living, etc.), whether engaged in manual labour or not, should obviously be excluded from the benefit of these enactments, as such persons may be reasonably supposed to be able to look after their own interests, to save money, and to insure their own risk. It is not necessary to extend protection to well-to-do people. It is only required for the poor.

The amount of the annual remuneration which excludes the employee from the benefit of the British Act must exceed £250, unless he is employed in manual labour, in which case he is included, however large his remunera-

tion may be. In Belgium (where the Act is confined to workmen) the amount is £96.

Employees engaged casually, or for less than a certain period, should be excluded. By the British Act employment for a period, however brief, involves liability, and the employer is liable to casual employees if the employment is for the purpose of trade, but not otherwise. Thus if a grocer hire a boy out of the street to carry a parcel of sugar to his customer, he is liable for an accident happening to him, but if he hire the same boy to carry his portmanteau to the railway station (at any rate with a view to a journey unconnected with his trade) he is not liable, a distinction which appears to be unreasonable.

It seems to me that the extent of the liability should in some way be commensurate with the period of the employment, and the rate of wages paid by the employer to the employee. But this principle is not generally recognised.

I turn now to the consideration of what conduct of the employee should be a bar to a claim. It is surely right that serious misconduct of whatever kind causing the accident should have this effect, whatever the result of the accident might be. A man must endure the consequences of his own misconduct. It is unjust to make him liable for the consequences of the misconduct of another.

“And where the offence is let the great axe fall.”

Under the British Act, misconduct, even when it is wilful as well as serious, does not exclude a claim if the result is death, or permanent disablement. The most common case of misconduct is drunkenness, and employers have very frequently been compelled to pay for a disaster brought about entirely by this cause.

In New Zealand no compensation is due in respect of any accident which is attributable to the serious and wilful misconduct of the worker injured or killed. In some countries serious neglect, in others gross misconduct, in others inexcusable fault, deprive the worker of his claim. In the Province of Quebec the Court may reduce the compensation if the accident was due to the inexcusable fault of the employee. There is room amongst those different provisions for a middle course, which I suggest should be fixed as above, viz. that serious misconduct should bar the claim.

As to the extent of the claim of the employee or his dependents I have several suggestions to make.

In case of disablement, if the payment of compensation begins too soon, there is a tendency to claim for an injury so trifling that it should be disregarded. I think fourteen days, the date which was fixed by the British Act of 1897, is the right period. The diminution from fourteen to seven days made by the Act of 1906 has led to a great increase in the

number of claims, and to a great exaggeration of injuries suffered. In some countries the compensation begins at once; in some it is delayed for as long as thirteen weeks; in others for lesser periods of differing extent.

The amount of the allowance should be half the wages, with a maximum limit varying according to the rate of wages prevailing in each country. In the United Kingdom the maximum is £1, in some continental countries it is a good deal less, and in New Zealand and under the Australian Seamen's Compensation Act, 1909, it is as high as £1 10s.

The liability to continue weekly payments should only last for a certain number of years, and there should be a limit to the total amount. Under the British Act it ends only with the life of the employee, subject to a right to redeem the liability by payment of a capital sum sufficient to purchase an annuity for the latter equal to 75 per cent of the annual value of the weekly payment, and there is no limit to the total amount of the liability of the employer. This is very unreasonable. It is quite possible under this Act that an employer who has only employed a man for five minutes may have to support him for sixty or seventy years, or pay a very large sum for redemption. In Spain the obligation is limited to two years' wages. In New Zealand the term for which the payments are required is six years, and the maximum amount is £500. In the Province of Quebec the maximum is \$2,000.

There should be a scale of payment in fixed lump sums, or fixed weekly payments, bearing a relation to the rate of wages for permanent injuries consisting of the total loss of certain members of the body, such as a leg, an arm, or an eye. This would so greatly simplify the prompt settlement of claims, and be such an important inducement to injured workmen to return to work as soon as they are able to perform it, as to justify a rough and ready mode of fixing the compensation. In New Zealand the Act of 1908 provides in a special schedule for assessing compensation for injuries that are necessarily permanent, *e.g.* the ratio of compensation for the loss of one eye is 30 per cent of the full compensation, and if the other eye is also seriously affected it is 75 per cent of the same.

In case of death the amounts payable to dependents vary greatly in different countries; and there is also a difference in the mode of payment. In some countries, including Great Britain, a lump sum is paid. In some other countries an annuity is substituted.

In regard to the dependents, illegitimate relations in certain degrees are generally entitled to claim jointly with the legitimate. French law takes the precaution of only including such children as are "*réconnus avant l'accident*"; and it only includes children whether legitimate or not under sixteen years.

It seems to me that illegitimate dependents should be excluded altogether. Irrespective of moral considerations, it is obvious that the difficulty of proof of paternity is often very great (children are, of course, the most

important of the illegitimate dependents), and that the attempt to prove it often leads to much false allegation. At any rate illegitimate dependents, children or others, should not be allowed to compete with those who are legitimate in the distribution of the fund provided for compensation, which they are entitled to do under the British Act.

If by the negligence of any one another who is not in his employ is killed, the British law does not give any remedy to the illegitimate relatives who are dependents of the deceased; and I suppose that the law must be to the same effect in this respect in many other countries. Why should such dependents of an employee have greater rights than the dependents of a stranger?

With regard, however, to the receipt by injured persons or the dependents of those killed of payments of lump sums in satisfaction of their claims, there are very serious objections. Some machinery ought to exist for spreading the payment when advisable over a long period. With regard to dependents there is some protection under the British Act, but with regard to injured persons none.

It is of common knowledge that, when those who are unaccustomed to have large sums in their control become possessed of them, they are apt to spend them recklessly. And it very frequently happens that amounts paid in redemption of liability are thus wasted. Sometimes such payments do harm rather than good, the recipients indulging in drink and dissipation to such an extent as to bring about illness or death. This is especially the case in regard to unskilled labour. If the British Government would inquire into the mode in which those payments are spent (which could be done through the Poor Law Guardians, the Charity Organisation Societies, and the police), they would find how great this evil is. It could be best remedied under a system of insurance, where machinery would exist for arranging the payments according to the individual requirements of each case. In default of this the Court, or a public official, should receive the sum in question, and pay it over to the person entitled in such portion and at such times as would be most for his benefit.

The mode generally in which the enactment should be administered and the expense dealt with depends upon whether personal liability or insurance is the basis for providing compensation.

In addition to what I have already urged in favour of prompt and independent investigation and medical direction, I may say that I am in favour of a reference of disputes to the ordinary local Courts of Justice; such as in England the County Courts. A judge with no general experience in the administration of justice would be very unsatisfactory. In the British Workmen's Compensation Act, the judge is for some mysterious reason called an arbitrator; but for practical purposes he remains a judge notwithstanding his statutory appellation. The Court must be local in order to avoid expense. The great points are promptitude of decision and

cheapness. Juries should be excluded as too uncertain and varying in their verdicts. But the Court should not be hampered, as the English County Courts are, with an enormous mass of rules and forms, to determine the meaning of which often causes litigation, which has little or nothing to do with the merits of the case.

I recommend that only one appeal should be allowed. The delay in the United Kingdom in obtaining the decision of two Courts of Appeal is very considerable, and in other countries it is very much greater. In the United States this and legal delays generally are so great as to amount to a public calamity. There is also the question of expense to be considered.

For reasons already given, I am strongly in favour of providing for sickness and disease as well as accident, and that this should be accomplished by a system of insurance to which both employers and employees should contribute.

In this country we have workmen's compensation falling wholly on the employers, and old-age pensions falling wholly on the State, but no provision for sickness.

In Germany, as I understand the matter, sickness and accidents are provided for during the first thirteen weeks by a fund to which the workmen contribute two-thirds and the employers one-third; and old age and invalidity are provided for by a fund to which the employer, the workmen, and the State all contribute.

So far as regards accidents alone, I think that upon the basis of the German statistics the cost of an annual contribution by the workmen would work out at only a trifling sum per head. The inclusion of sickness, invalidity, and old age would naturally be more serious in this respect.

With regard to legal expenses, where there is a dispute in which the claimant succeeds, those incurred on both sides naturally and justly fall on the employer. But if the claimant fails, the employer can never recover his costs, for the simple reason that his adversary is unable to pay them. I do not know where to find a remedy for this misfortune in all cases; but where it happens (as it often does) that the claimant is a member of a Labour Union who are bound by agreement with him to take up his case, I think that the judge should have a discretion to require security for costs to be given at the beginning of the proceedings.

With regard to the bearing of the enactment upon the limit of shipowner's liability, it is to be observed that the British and the New Zealand Workmen's Compensation Acts, and the Australian Seamen's Compensation Act, provide that payments are to be made in full, notwithstanding this limit.

I am not aware of any similar provision in the laws of other countries, or of other parts of the British Empire. And yet it should not be forgotten that while under the law prevailing in the latter the liability of the shipowner

for loss of life or personal injury of all kinds extends to £15 per ton, with the addition, in the case of steamships, of engine-room space, his liability is by the law of all other countries limited to the value of the ship and freight, and is extinguished by the total loss of both.

The result is that the British shipowner is, by the special provisions of the Workmen's Compensation Acts referred to, as well as under the British Merchant Shipping Act (except in the case of ships of very high value), placed at a disadvantage as compared with foreign shipowners.

There remains a question which has, I think, excited some feeling of annoyance amongst our continental friends. I mean the right given by the British Workmen's Compensation Act to enforce a claim *in rem* against a foreign ship by arresting the vessel when in the jurisdiction of the British Courts, and proceeding against the party giving security as if he were the party liable. For practical purposes this right only extends to dock labourers and lightermen engaged in loading or discharging the vessel, so that the matter is not of much importance.

The liability *in rem* of foreign ships in claims for personal injury or death, whether of workmen or strangers, exists not only in the United Kingdom, but also in the United States. I understand, however, that it does not exist in some continental countries. The simplest way of removing the grievance would be for those countries to adopt a similar law for the benefit of their workmen.

With regard to the prohibition of contracts excluding the benefits of the special enactments, it appears to me that where the system of personal liability of the employer is in force, it is very important that exceptions to the law which prohibits contracting-out should be allowed in special cases. This is even more important in the interests of the employees, and of the community generally, than in that of the employer. The elderly, diseased, and weak, being more liable to accident than the young, healthy, and strong, the employer will not employ the former if held liable to compensate them for accidents really due not to the work, but to their physical condition. Workmen are frequently discharged for this cause, and it is a great hardship upon them that this should be so.

The reason why the employer adopts this course is well illustrated by a recent decision of the highest Court of Appeal in this country.¹ A workman suffering from an aneurism in so advanced a state that it might have burst at any time, even in his sleep, was tightening a nut with a spanner without using any unusual force, when this exertion ruptured the aneurism, and he died. The majority of the judges decided that the employer was liable to the dependents of the deceased. And yet it cannot be disputed that the death was really due to the disease rather than to the work.

Unless then contracting out is allowed, it is natural and not unreasonable

¹ *Hughes v. Clover Clayton & Co.*, 26 Times Law Reports, p. 359.

for the employer to refuse to employ a diseased man, or a man who from any other cause is specially liable to accident.

In most cases a superficial inspection is sufficient to enable an employer to reject old, weak and diseased persons; but in order to make sure the employer is now in many cases adopting a system of medical inspection before the contract of service is entered into. This is already very common in the mercantile marine. Thus many persons still capable of doing useful work are cast aside, the work which they could do is lost to them and to the community, and their maintenance is thrown upon the latter.

Why should not such persons be allowed to contract themselves out of the Act? The man referred to in the above case might well have felt (knowing that from the state of his heart he was liable to sudden death at any time) that he was ready to run the risk of dying at his work instead of in his bed.

The Trade Unions have protested against the action of employers in refusing to employ men who are elderly, or have some physical defect. But this is the inevitable result of the Act, and the interpretation put upon it by the Courts. The effect is likely to be especially grievous in the case of old domestic servants, a class which should as far as possible be cared for as part of the family. How cruel it would be if owing to the liability placed on employers by the Act such worthy old inmates of the household should be cast adrift, because the diseased state of their hearts or lungs makes them liable to death while engaged in any act of service, however slight!

The Trade Unions could very easily get this amendment passed by the British Parliament, as no one else would oppose the proposal, but if they insist on retaining both the universal liability of the employer and the universal prohibition of contracting out, they must fail, as all fail who seek both to have their cake and to eat it.

It is interesting to see that New Zealand has made a movement in favour of contracting out, although it does not touch the case of age. The Act of 1908 provides that a worker may agree with his employer that no compensation be payable on account of disease or injury from which he has suffered prior to the employment, if the agreement be first approved by a magistrate.

The legislature of Queensland has gone still further in this direction. For in addition to a somewhat similar provision as to workmen suffering from disease or injury, the Queensland Act of 1905 allows workmen over sixty years of age to agree in writing with their employers to fix a maximum rate of weekly payment of not less than 5s. with a minimum total liability, whether in case of injury or death, of £50.

In my view a permission to contract out in all cases of physical debility, or of persons who have reached a certain age, say fifty, would be one of the most valuable reforms in the interest of all concerned—the employer, the

employee, and the community—which could be made in the legislation relating to the subject of Workmen's Compensation.

I have spoken chiefly from my experience of the working of the British Act. It will be interesting to learn the experience of other members of our Association with reference to the working of similar laws in other countries. As to the latter enactments I may perhaps have fallen into some errors. If so I shall be glad to be corrected.

THE DECLARATION OF LONDON.¹

[Contributed by SIR JOHN MACDONELL, C.B., LL.D.]

I.—INTRODUCTORY.

I PROPOSE to examine some of the chief effects of the Declaration of London, one of the most important instruments in the history of International Law. It is not yet ratified by this country. But, whatever may become of it, the Declaration is a unique expression of opinion by some of the chief States of the world as to International Law and usages. It marks their approximation to an agreement respecting matters as to which they have hitherto been divided. It is just to claim that "the Declaration puts uniformity and certainty in the place of the diversity and obscurity from which international relations have too long suffered" (General Report of Drafting Committee, p. 34). It is just to add that the Conference from which the Declaration issued "tried to reconcile in an equitable manner and practicable way the rights of belligerents with those of neutral commerce." It is eminently a work of compromise and mutual concession; and to this may be traced some of the defects which I venture to point out. I should be misunderstood if I did not preface my remarks with recognition of the good work done by the Conference. Points over which nations have quarrelled, which have brought about bloodshed, and which jurists have long discussed without coming to an agreement, have been, it is to be hoped, finally settled. Differences retained for no sufficient reasons between the practices of this country and foreign countries have been obliterated. I am not stating too much in saying that more has been done by this Declaration and the Conventions entered into at The Hague in 1899 and 1907 than had been accomplished in a century previous. There has been a spirit of give and take, an obvious desire to understand the aims of each country, and not to look solely at national interests, or to persist in standing by traditions; all which has been fruitful, and promises well for the future.

Let me add this further prefatory remark: there was no likelihood of establishing an International Prize Court without first framing an Inter-

¹ Read August 2, 1910, at the Guildhall before the Congress of the International Law Association.

national Prize Law. It was worth paying a high price to obtain the former, even if it be only one of appeal.

I would make one other general observation. I have heard it said with reference to this Declaration: "The day of the international jurist is over; the work of developing International Law passes from his hands to those of statesmen and diplomatists meeting in conference, discussing points of difference, and agreeing to some compromise." And assuredly when I look to the varied and important contents of the Conventions agreed to at The Hague in 1899 and 1907, and of the Declaration of London—matters which had been debated by jurists with little effect for centuries, disposed of swiftly—I am inclined to think that, if the day of the jurist is not over, his part has changed, or is changing; his future work will differ materially from his past. He will prepare the way for the wise exercise of the treaty-making powers of States; he will note and point out difficulties; he will formulate the true problems, and often suggest the best solutions; he will elucidate principles when once they are laid down. But, judging from the comparative facility with which Conventions regulating large regions of law have been adopted, the treaty rather than jurisprudence will be the chief instrument of development of International Law. Nations will meet through their representatives and go, so to speak, into committee, and the outcome of their deliberations, a treaty or treaties, will be for International Law what the statute is more and more for the expansion of national and municipal law.

II.—THE PARTIES TO THE DECLARATION.

By a circular letter of February 27, 1908, from the British Foreign Office, invitations were sent to nine Powers to attend a Conference in London. Subsequently Holland also was invited. The representatives of ten States, the chief military and naval Powers of the world (France, Germany, Great Britain, Italy, Russia, Spain, Austro-Hungary, Japan, Netherlands, and the United States) attended. There was no representative of any South American State. Nor was there any representative of Norway or Sweden, though the interest of the former in questions of neutrality, as a State with a large mercantile marine, is considerable. The Declaration contains the law which the International Prize Court will administer. Judges and deputy judges will in pursuance of Art. 15 of the Convention establishing a Prize Court sit in that Court, according to a prescribed rota; and on that rota are judges appointed by such States as Brazil and the Argentine. The question suggests itself: Will the representative of the States which are not parties to the Declaration be bound by its terms? Technically, I presume not; they have agreed only to the Prize Court Convention, assuming they have ratified it. But of course the consensus of ten Powers of the first order of importance as to the chief problems of

Prize Law cannot but have great weight; in most cases it will, I presume, be conclusive.

Another group of States has to be considered. Art. 7 of the Convention for the establishment of an International Prize Court says that "if the question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself, or whose national is, party to the proceedings, the Court is governed by the provisions of the said treaty." Now some States have special treaty provisions as to matters included in or relating to the Declaration. Thus Germany (Russia) and the United States are parties to treaties (July 11, 1799, and May 1, 1828) by which contraband is not confiscated, but only expropriated; Italy and the United States to a treaty by which immunity of private property at sea is recognised (February 26, 1871). It will be the duty of the Prize Court to apply such special provisions even if they conflict with the Declaration.

III.—FORM AND POLICY OF THE DECLARATION.

Of most of the articles in the Declaration one may say that they embody, as M. Renault observed, a *media sententia*. Some of the articles are drawn, no doubt, to secure general assent, in a vague manner—to quote an historic phrase, in "less accurate language"—which will leave the decision of questions certain to arise in warfare to the discretion of belligerents, or of the Court if they come before it. Some of the ambiguities are removed, wholly or partly, by the accompanying General Report. Some still remain; and in dealing with contraband I shall mention a few of them.

Unfortunately, the exact degree of authority of the report is not clear. It is stated in the despatch of March 1, 1909, that "in accordance with the principles and practice of continental jurisprudence, such a report is considered an authoritative statement of the meaning and intention of the instrument which it explains, and that consequently foreign Governments and Courts, and no doubt also the International Prize Courts, will construe and interpret the provisions of the Declaration by the light of the commentary given in the report."¹

Nothing to this effect appears in the Declaration. The commentary seems occasionally to extend or qualify, if not conflict with, the text. The tribunal which construes the latter may have a fresh difficulty if any of the Powers append to their ratification a statement of their understanding of any particular article.² In extenuation of the occasional loose phraseology it may be urged that this is a usual fault in the early stages of codification. Unfortunately, compromises entered into in order to obtain unanimity are apt to be forms of words which conceal rather than remove differences of opinion; the temporary interment of troublesome questions.

¹ Miscellaneous No. 4 (1909), p. 94.

² See answer of the Secretary of State for Foreign Affairs, April 5, 1909.

Though the Conference of London accomplished much, it did not produce a complete Code of Prize Law. The rules agreed to are said to "correspond in substance with the generally accepted principles of International Law"; but they are not exclusive and complete. At the second Hague Conference a convention defining the Rights and Duties of Neutral Powers in Maritime War (No. XIII.) was agreed to. There was also another convention (No. XI.) relative to certain restrictions on the exercise of the right of capture in maritime warfare, and dealing, among other matters, with the important subject of postal correspondence. As to more than one passage we must read the Conventions of The Hague before we can fully comprehend the Declaration. Even read in connection with them the Declaration is incomplete. Matters of importance to neutrals and belligerents are left untouched by the seventy-one articles. Nothing is decided as to the transformation of merchant vessels into ships of war; and while that is unsettled the facilities for reviving the substance of privateering remain. Nothing, too, is decided as to the enemy or neutral character of the owner of the goods. There are also other omissions to which I shall advert.

As to the scheme of the Declaration, it consists of seventy-one articles and nine chapters. The first part deals with blockade; the second with contraband; the third with unneutral service; the fourth with destruction of neutral prizes; the fifth with transfer of a neutral flag; the sixth, enemy character; the seventh, convoy; the eighth, resistance to search; the ninth, compensation.

Before discussing individual articles of the Declaration, a word as to the policy underlying it. Dealing as it does with the conflicting claims and interests of belligerents and neutrals, it may be looked at from the point of view of either. In other times than the present, the interests of the former dominated, and with some show of reason. They were contending, it might be urged, for existence; their demands ought to be supreme. There was force in the sharp opposition drawn by Albericus Gentilis, in a well-known passage,¹ between the subsidiary interests of commerce and the vital interests of the State as a belligerent. That contrast is not so great as it was. In the world of to-day, some communities are dependent on foreign supplies of food for their very existence and for raw materials essential to their chief industries. We live by oversea trade. To us and some other nations unimpeded commerce may be a question of supreme importance.

Further, peace is to-day what it once was not; it is now the normal condition of the world; and *prima facie*, subject to well-established usages, neutrals are entitled to pursue their trade irrespective of quarrels to which they are no parties. I cannot say that the Declaration contains a com-

¹ "Jus commerciorum æquum est: at hoc æquius tuendæ salutis. Est illud gentium jus: hoc Naturæ est. Est illud privatorum: est hoc regnorum. Cedat igitur regno mercatura, homo naturæ, pecunia vitæ. Istæ sunt rationes solvendi legum pugnas: ut digniori, utiliori, æquiori cedatur legi" (*De Jure Belli*, lib. i. c. 21).

pletely equitable recognition of the rights and interests of neutrals. It is, with all its many merits, in the main a series of compromises between States reluctant to give up anything which might be of use in war.

IV.—BLOCKADE.

Several of the articles relating to blockade repeat generally accepted rules. Thus Art. 1 states the present recognised rule as to blockade. Art. 2 states the rule formulated in the Declaration of Paris of 1856, that a blockade to be effective must be maintained by a force sufficient really to prevent access to the enemy coast-line. The wording of this seems inconsistent with the notion that a blockade can be maintained only by stationary vessels; a rule which some of the advocates of the Armed Neutrality of 1780 and 1800 attempted to set up, and the observance of which is incompatible with the conditions of modern maritime warfare and with the weapons now in use.

No express mention is made of blockading by means of mines, floating or moored, laid off the coast or port blockaded; a measure which it is possible will in some circumstances be resorted to. The wording of certain articles (e.g. 2 and 6) seems opposed to such methods of barring entrance or egress. Such a phrase as "sufficient force" or "blockading force" is, to say the least, an inapt description of apparatus operating automatically. The rules on the subject contemplate the admission of neutral vessels of war in certain circumstances or neutral vessels in distress, which might be incompatible with the existence of a girdle or line of mines. But it must be remembered that the tribunal will have to take note of other Declarations than that of London. By Convention VIII., Arts. 1 and 2 of The Hague, which is binding on the signatories, it is forbidden to lay unanchored automatic contact mines, unless they be so constructed as to become harmless one hour at most after those who laid them have lost control of them, or to lay anchored automobile contact mines which do not become harmless as soon as they have broken loose from their moorings. It is also forbidden to lay automatic contact mines off the coast and ports of the enemy *with the sole object of intercepting commercial navigation*. This last prohibition may be said to stamp as illegitimate the blockading by such means of a purely commercial port. It does not prevent the use of such means in the case of a port where lie belligerent ships of war or a port into which such vessels seek to enter. In fact, this point was discussed at The Hague in 1907. The British representative proposed to prohibit the use of mines for commercial blockades and elsewhere than before naval ports. Another proposal was that they should be employed only for coast defence, and only within the maximum distance of cannon range. Both proposals were rejected.¹

¹ Miscellaneous, No. 4 (1908), pp. 229, 230. See Professor Westlake's comments on this article, *International Law*, part ii. p. 326.

The conditions of naval warfare have so changed, and are so changing, that there may be a strong temptation to employ mines, if not exclusively, as a supplementary or auxiliary method of blockade. It seems clear that blockading in the future will have little resemblance to the operations of Collingwood off Cadiz, Brest, and Toulon.¹ The 21-inch torpedo with a range of over 7,000 yards, a speed of 40 knots, and "astonishing" accuracy;² the submarine with a speed when submerged of 10 knots, and a range of 2,500 miles; the aviator capable of moving by day or night, and dropping explosives over battleships in the vicinity of blockaded ports: these facts may have—in the opinion of some authorities they actually have—changed the situation. It is true that in 1899 and 1907 there was adopted a Declaration, the parties to which agreed to prohibit "the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." But neither Germany nor France, nor any of the other great military Powers except Austro-Hungary, has agreed to this prohibition. The probable effects of these changes upon blockades are thus described by writers of authority:

We have a sort of half-digested idea that because we "blockaded" the enemy's ports in old days we ought to do so again. Some impulsive people get purple in the face when they hear of any strategy but that of Duncan at Camperdown. They only ask to lie alongside the enemy, and will let strategy go hang. But, after all, it is not possible by naval action to extract a hostile fleet from its harbour, like an oyster from its shell, if it does not propose to come out; while as for blockading, in its popular interpretation, Nelson's principle was absolutely the reverse, as he has left on record in the plainest terms. Not even the watches off Brest, Toulon, and Cadiz are now simple operations. The mine, the improved torpedo, the submarine, the destroyer, the airship, wireless telegraphy, and long-ranging coastal ordnance have revolutionised the conditions of operations off an enemy's coast, and whether it likes it or not, has to take account of the situation. I think that our battle fleets will have to keep out of harm's way, and leave the flotilla to carry on the war.³

It is likely that long before the ships which are now being built shall have become obsolete, seas like the Baltic, the North Sea, the Mediterranean, the Yellow Sea, the Sea of Japan, and many other seas of a similar nature will become entirely unsafe as operating grounds for battleships in cases where an enemy possesses coasts bordering on such seas.⁴

Instead of the patrol of a number of ships, described by Collingwood in his letters, one vessel in communication by wireless telegraphy with others lying far distant, but capable of steaming 18 to 24 knots an hour,

¹ Russell's *Life of Collingwood*, p. 86.

² "The Submarine Menace," by Colonel A'Court Repington, *Blackwood's*, June 1910, p. 894.

³ *Ibid.*, p. 897.

⁴ Professor Hovgaard, *Jane's Fighting Ships*, 1910, p. 502. For another view see chapter on "Blockades under Existing Circumstances," by Admiral Colomb, *Essays on Naval Defence*, published in 1893, and written in 1887.

might suffice; and it may be that, owing to the constant danger from torpedoes and submarines, there will be a temptation to employ mines as a supplementary or auxiliary method of blockade. Another result may be, Art. 17 notwithstanding, to greatly widen the operations of blockading squadrons, to the detriment of neutrals. As to this I quote the words of Mr. Julian Corbett:

Under modern conditions of naval warfare it was almost impossible to draw the line between blockade and pelagic capture. The reason for that was the introduction of the torpedo. *Blockade close to the enemy's port was now impossible.* Warships must go so far out at sea that their operations could not be seen from the shore. Assuming—what was very likely with so friendly a Power—they were at war with France, and they wished to blockade the Atlantic ports, probably the only way would be to extend a line of cruisers from the Scilly Isles to Finisterre. They could, therefore, always justify a capture on the high seas on the ground that they were occupying the only possible situation for blockading a port.¹

As to the other articles relating to blockade, I have little to say. Art. 2 is so worded as to make it doubtful whether a blockade of ingress only is intended. I conceive, however, that the words, though not felicitous, are designed to apply to both ingress and egress. Arts. 3 and 4 also confirm general usage.

Art. 6 permits the entrance of neutral vessels of war. This has sometimes been put forward, erroneously it seems to me, as a matter of right (Bluntschli, Art. 828). The article, as I understand it, is intended to permit entrance of ships of war of neutral States at the discretion of the belligerent, without rendering the blockade ineffective or partial.

The first notable changes are made by Arts. 8 and 9. The former states: "A blockade, in order to be binding, must be declared in accordance with Art. 9 and notified in accordance with Arts. 11 and 16." In other words, no declaration and no notification, no blockade.

First as to the declaration. "A declaration is made either by the blockading Power or by the naval authorities acting in it." The present rule, according to the English authorities, is that "a blockade may exist without a public declaration; although a declaration unsupported by fact will not be sufficient to establish it" (Lord Stowell, *The Mercurius*, 1 C. Rob. 1798, p. 82). "If the individual is personally informed, that purpose is still better obtained than by a public declaration" (p. 83).

Next, as to notification. The declaration must be notified to neutral Powers by communications addressed to the Government direct or to their accredited representative to the local authorities. There is no obligation to give notice to the ship which has actual or presumptive knowledge. In other words, the rule of French jurisprudence, which requires special notification to the ship, is not followed. Art. 12 states that "the rules as

¹ Speech at National Liberal Club, November 9, 1909. Some of the representatives proposed a limit of 800 to 1,000 sea miles. Miscellaneous No. 5 (1909), p. 162.

to declaration and notification of blockade apply to cases where the limits of a blockade are extended"—which is the present rule.

Art. 13 ("The voluntary raising of a blockade, as also any restrictions in the limit of the blockade, must be notified in the manner prescribed by Art. 11") may be useful to neutrals. The report states: "This non-fulfilment will have more or less serious consequences according to circumstances." Whether under any and what circumstances the belligerent who failed to give notice of raising or restricting of blockade is liable in damages is not stated.

In *The Neptune* (2 C. Rob. 111) Lord Stowell said: "The effect of a notification to any foreign Government would clearly be to include all the individuals of that nation; it would be the most nugatory if individuals were allowed to plead their ignorance of it; it is the duty of foreign Governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a notification of a blockade that he is ignorant of it." But Art. 15 apparently contemplates the possibility of such an averment being made and believed; "*failing proof to the contrary, knowledge is presumed,*" etc.

When special notice to a vessel is required is stated by Art. 16: "If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force." The explanation in the report (p. 41) may be quoted: "It cannot be admitted that a merchant vessel should claim to disregard a real blockade, and to break it for the sole reason that she was not personally aware of it. But though she may be prevented from passing, she may only be captured when she tries to break the blockade after receiving the notification. The special notification is seen to play a very small part, and must not be confused with the special notification absolutely insisted on by the practice of certain navies" (p. 41). This appears to be the English rule, which is less favourable to neutrals than the French rule, but which does not seem unfair. It substantially comes to this: a vessel must be somehow made aware of a blockade, otherwise no capture. If she sails without actual knowledge she must get it from the blockading squadron.

Art. 17 contains a very important concession to neutrals. According to certain decisions of the United States Courts a vessel may be captured if she has set out for the purpose of breaking a blockade, even if she intended to touch at an intermediate neutral port.

According to certain English decisions a vessel which sails to a blockaded port after notification and with knowledge may be captured at any time, however distant she may be from her destination.

This is clearly altered by Arts. 17, 19, and 20. Art. 17 declares that neutral vessels may not be captured for the breach of blockade, except

within the area of operations of the warships detailed to render the blockade effective, as to which it is said "all the zones watched together, and so organised as to make the blockade effective, form the area of operations of the blockading naval force. . . . It is clear that a blockade will not be established in the same way on a defenceless coast as on one possessing all modern means of defence. In the latter case there could be no question of enforcing a rule such as that which formerly required that ships should be stationary and sufficiently close to the blockaded places; the position would be too dangerous for the ships of the blockading force which, besides, now possess more powerful means of watching effectively a much wilder zone than formerly" (Report, pp. 41, 42). It is not enough that the vessel is on her way to a blockaded port; there must be a real attempt to pass the forbidden line or zone. This is made clearer by Art. 19: "Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured if, at the moment, she is on her way to a non-blockaded port"; which puts an end to the doctrine laid down in *The Columbia* (1 C. Rob. 134), which bars the application of the doctrine of continuous voyages to blockades, and is at variance with the doctrine laid down by the Supreme Court of the United States.

Art. 21 states that the owner of cargo is to be condemned "unless at the time of the shipment he neither knew nor knows of the intent to break the blockade." Having regard to the English authorities (e.g. *The Adonis*, 5 C. Rob. 256; *Baltazzi v. Ryder*, 12 Moore P.C. 168), I do not think that this imposes a new burden upon neutrals. It is true that the rule on the subject, as laid down in the *Mercurius*, was "to maintain that the conduct of the ship will affect the cargo it will be necessary either to prove that the owners were, or might have been, cognisant of the blockade before they sent their cargo; or to show that the act of the master of the ship personally binds them"; and Lord Stowell proceeded to point out that "the master is not the agent of the owners of the cargo, unless expressly so constituted by them" (p. 84). But the Judicial Committee went further, and laid it down "that when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, and they might therefore by possibility be privy to an intention of violating the blockade, such privy shall be assumed as an irresistible inference of law, and it shall not be competent to them to rebut it by evidence; that in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent, the master shall be treated as the agent for the cargo as well as for the ship" (p. 186). I should gladly have seen a milder rule introduced. It is difficult to see how in some cases a shipper really innocent can prove that he "*could not* have known of the intention to break the blockade."

To sum up the effect of the rules as to blockades: they are, on the whole, a fair compromise. They give certain advantages to neutrals. On

the other hand, they do not make blockade very difficult, if not almost impracticable, as the French rules in effect do. But as to some of the rules one cannot help thinking that they are founded on past experience and may be inapplicable to future maritime warfare. So often International Law comes too late: its rules are painfully and slowly elaborated; when the final formula is found the old conditions have vanished or have varied.

V.—CONTRABAND.

Chap. ii. is concerned with contraband, a subject as to which there have been great differences in opinion and practice since the sixteenth century with little tendency to approximation. Two distinct doctrines have been taught; one, sometimes called the Continental doctrine, recognising only absolute contraband, *i.e.* articles exclusively used in war. The other recognises not only absolute contraband, but also relative, conditional, or accidental contraband, *i.e.* articles which, though not exclusively used for purposes of war, may be so used. This is sometimes called the Anglo-American doctrine.¹

The Declaration takes a *via media*. It retains the distinction between absolute and relative contraband. It enumerates a large number of articles which are absolute contraband without notice. Though long, the list is not necessarily complete. It is stated (Art. 23) that goods, etc., "exclusively used for war" may be added to the list of absolute contraband by a declaration to be notified. The only restriction is that the addition to the list does not bind other Powers; that the new article must be "exclusively used for war"; and that there may be an appeal to the International Prize Court if any wholly unjustifiable additions are made. I am not satisfied that these qualifications afford much protection against abuses. In the heat of war and with the natural oblivion of all but immediate gains, there will be a strong temptation to snatch a passing advantage by declaring absolute contraband any commodity which happens to be very useful to an adversary. It would have been more satisfactory if the list were not susceptible of addition except by agreement of the parties to the Declaration.

Next as to conditional or relative contraband. Art. 24 enumerates articles which are "susceptible of use in war" as well as adapted for purposes of peace, and which may without notice be treated as conditional contraband. It includes food-stuffs, forage and grain suitable for feeding animals, railway material, etc.*

One clear gain is conferred upon neutrals by Arts. 28 and 29, which establish a tolerably long and carefully selected list of free goods. This

¹ At The Hague Conference the British Government proposed the abolition of contraband; and several States (including Portugal, Switzerland, Belgium, Austria-Hungary, Sweden, and Brazil) were favourable to this bold proposal. Twenty-six representatives voted for abolition; five voted against it; and four abstained.

would be more valuable if there was provision for periodical extensions or revisions at very short intervals of the free list. In view of the constant and rapid changes in the methods and appliances of warfare, this seems desirable. It is to be regretted that, while provision is made for additions to the list of absolute contraband, there is no provision for an expansion of the free list at short intervals.

So much as to the *nature* of contraband goods; next, as to the other element, their "*destination*," an ambiguous expression, which may mean the destination of the ship carrying them, or the ultimate destination of the goods themselves. The latter sense is by no means clear. Goods suitable for different purposes and markets may be shipped with no certainty as to the place of destination; the master receiving instructions by telegraph where to go according to the state of prices. The cargo may change hands during the voyage, with the result of a change in the destination of the goods. The goods may go to a neutral port, only to be conveyed thence overland to the belligerents. They may be on their way to an army or a fleet or to the civil population just as demand and prices may determine.

Under what circumstances may such goods be captured? The answer (so far as given) to this question is exceedingly complex. Absolute and conditional contraband are dealt with differently. The former is liable to capture (Art. 30) "if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. *It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land.*"

This affirms the doctrine of continuous voyage probably in terms more extensive than the English authorities have used. It goes, I think, beyond what Lord Stowell meant by destination. He did not always state the rule in exactly similar terms; but, speaking generally, destination for him meant destination of ship, which must be to an enemy port or territory. In the *Imina* (3 C. Rob. 167) he remarked:

This is a claim for a ship taken at the time of sailing for Emden, a neutral port; a destination on which, if it is regarded as the real destination, no question of contraband could arise, inasmuch as goods *going to a neutral port cannot come under the description of contraband*, all goods going there being equally lawful. The rule respecting contraband being, as I have always understood it, that the articles *must be taken in delicto, in the actual prosecution of a voyage to the enemy's port*.¹

Art. 30, as worded, might seem to throw the onus of proof on the

¹ Of course, the intervention of a neutral port will make no difference if the goods are enemy's property, or if the home merchant is really trading with the enemy (*The Jonge Pieter*, 4 C. Rob. 79). Nor will mere transshipment at a neutral port without actual importation break the continuity of the voyage.

See the decisions, somewhat difficult to reconcile, in *Zelden Rust* (6 C. Rob. 93) and *Frau Margaretha* (6 C. Rob. 92). Stress was laid on the fact that in the latter there was land carriage.

captor. This, however, is altered by Art. 31, which, dealing with absolute contraband, states that proof of destination, *i.e.* "hostile destination," is complete:

(a) When the goods are documented for discharge in an enemy port; or (b) for delivery to the armed forces of the enemy; (c) when the vessel is to call at enemy ports only; (d) or when she is to touch at an enemy port; (e) or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented.

Cases (d) and (e) are, it is suggested, new. It comes to this: Goods may, in fact, be destined to a neutral port, and yet because the vessel carrying them touches at a hostile port, they are seizable; the reason being, it may be assumed, the strong temptation to dispose of them to the belligerent. Rarely has such a contention been in recent times put forward by a belligerent. We have got beyond the doctrine of continuous voyage; we are in presence of the doctrine of probable destination of goods. We are not far off that of possible destination.

So much for absolute contraband. For reasons by no means convincing, the doctrine of continuous voyage is not applied to conditional contraband. Art. 33, which deals with *conditional* contraband, declares that goods are liable to capture if they are "destined for the use of the armed forces of a Government Department of the enemy State, *unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress.*" These words are vague in themselves, and may be fraught with grave consequences; they are not made clear or less important by what follows. Art. 34 raises a *presumption* of such hostile destination "if the goods are consigned (a) to enemy authorities, or (b) to a contractor (*commerçant*) established in the enemy country, who, as a matter of common knowledge, supplies articles of this kind to the enemy, (c) to a fortified place, (d) or other place serving as a base for the armed forces of the enemy."

Let us consider the effect of these rules upon food-stuffs. And first as to the existing rule, which may be stated in the words of Lord Stowell in *The Jonge Margaretha* (1 C. Rob. 188): "The nature and quality of the port to which the articles were going was not an irrational test," and he added:

If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place; and although it is possible that the articles might have been applied to civil consumption, *for it being impossible to ascertain the final application of an article ancipitis usus, it is not an injurious rule which deduces both ways the final use from the immediate destination.*

The present rule on the subject may be thus stated in the words of our Government, when protesting against the extension given to contraband by the Russian Government :

His Majesty's Government could not, however, admit that, if such provisions were consigned to the port of a belligerent (even though it should be a port of naval equipment), they should therefore be necessarily regarded as contraband of war. In the view of His Majesty's Government, the test appears to be whether there are circumstances relating to any particular cargo to show that it is destined for military or naval use.¹

Professor Holland expresses the rule² in these words :

Provisions in neutral ships may be intercepted by a belligerent as contraband only when, being suitable for the purpose, they are on their way to a port of naval or military equipment belonging to the enemy, or occupied by the enemy's naval or military forces, or to the enemy's ships at sea; or when they are destined for the relief of a port besieged by such belligerent (Report of Food Supply Commission, p. 24).

Do the proposed new rules give importers of food-stuffs and the community dependent thereon the protection which they now have, or something less? I am inclined to think something less; how much less one cannot be sure. Do they give the protection afforded by continental authorities? The majority of continental writers, at all events many of them, have been opposed to regarding food-stuffs as contraband under any circumstances, though the practice of continental States has not even in recent times always agreed with them; and there is a tendency on the part of foreign writers to adopt the English view.³ These rules may protect us against the wide extension sometimes given by belligerents to contraband. Do they ensure to us the necessary minimum of safety as to our food supply? I doubt it.

The effect of these articles upon the importation of food-stuffs is not made less menacing by the commentary upon Art. 34 in the General Report?

What is the solution when the goods are destined for the Civil Government Department of the enemy State? It may be money sent to a Government Department for use in the payment of its official salaries, or rails sent to a Department of Public Works. In these cases there is enemy destination which renders the goods in the first place liable to capture, and in the second to condemnation. *The State is*

¹ Lord Lansdowne to Sir C. Hardinge, January 1, 1904. See also Lord Granville to M. Waddington, February 27, 1885, State Papers, lxxvi. p. 437; and Lord Salisbury's statement, quoted in Moore's Digest, vii. p. 685.

² "Which has all but won its way to universal acceptance": Appendix to Report of Food Supply Commission, p. 265.

³ *E.g.* France in 1885 and Russia in 1904. According to Ullmann, food-stuffs are to be regarded as contraband only if "die Zufuhr unmittelbar einem militärischen Zwecke dient, z. b. wenn die Lebensmittel unmittelbar einer feindlichen Flotte zugeführt werden" (s. 193).

one though it necessarily acts through different departments. If a Civil Department may freely receive food-stuffs or money, that department is not the only gainer, but the entire State, including its military administration, gains also, since the general resources of the State are thereby increased. Further, the receipts of a Civil Department may be considered as of greater use to the military administration and directly assigned to the latter. Money or food-stuff really destined for a Civil Department may thus come to be used directly for the needs of the army. This possibility, which is always present, shows why destination for the department of the State is assimilated to that for its armed forces (p. 48).

This passage affirms or suggests a doctrine which has not in recent times, so far as I am aware, been broached; a doctrine which comes very much to this, that any supplies which are likely to find or may find their way into the hands of a department of a belligerent Government may be treated as contraband. It resembles somewhat a doctrine put forward in defence of the Order-in-Council of June 1793, in the heat of our war with France, declaring all food on its way to that country to be contraband, on the ground that the employment of famine against the whole population was a legitimate means of reducing the enemy to reasonable terms of peace.¹

I may put a case not wholly improbable: A war between England and some other country breaks out; distress, accompanied by much unemployment, ensues; riots owing to the high price of food take place; the Government purchase and import food both for the fleet and for relief of the civil population; it is presumably contraband if the doctrine suggested in the text is applied, it is certainly such if the doctrine in the report is followed.

Let me note another possible consequence: Hostile destination is presumed by Art. 34 in cases in which food-stuffs go to a "contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy," or "if the goods are consigned to a place serving as a base for the armed forces of the country." A.B., an importer of flour, is one day supplying the troops at Aldershot, and on another supplying wheat to millers; would not a consignment to him be presumably contraband? I am not sure what "base for the armed forces" means. If it includes, as it probably does, "base of supply," London or Southampton might be held to be the base of our troops at Aldershot.²

It may also be pointed out that Art. 34 as drawn has little or no relation to the actual course of trade in grain and food-stuffs and other articles which might be classed as conditional contraband. The framers of these Articles had probably in view a state of commerce simpler and more

¹ American State Papers, i. 240.

² It will be recollected that the phrase "base of operations" gave rise to much difference of opinion in the Geneva Arbitration. Colonel James (*Modern Strategy*, p. 16) points out the ambiguity of that phrase and of "base of supply," which in the widest sense may include the whole country to which the army or fleet belongs.

primitive than that which now exists;¹ and their application to present conditions might be difficult.

As an English lawyer, I may be pardoned for having dealt at some length with this matter, vital to a country which draws about four-fifths of its food supply from abroad, and which, as we are informed by the Food Commission, keeps occasionally a supply sufficient only for about seven weeks. This is a matter as to which there should be no possible obscurity. Our interest is clear; our policy should be the same.

Two general observations on the subject of conditional contraband. The doctrine of continuous voyage does not apply to conditional contraband; it is excluded by Art. 35. Consequently, broadly speaking there can be no capture of any such contraband going to continental countries, Switzerland excepted: it will be enough for them to direct consignment to a neighbouring neutral port—in the case of Germany to Antwerp, Amsterdam, Rotterdam, or (if the goods be of small bulk) to Trieste—and forward the goods to their final destination by rail, river, or canal, which can under modern conditions of transport always be done. On the other hand, of course every consignment of similar goods to England will be direct, and, as such, subject to capture. This is not in theory the abolition of the capture of conditional contraband, so far as all continental States are concerned, and its maintenance against England. In practice it might be so.

Further, there is substituted for a clear objective test—the destination of the vessel to be ascertained by her papers, unless they are false or she is out of her course—a subjective and complex test; an inquiry into motives, with necessarily uncertain results. This will appear if I put into a tabular form the suggested tests.

ABSOLUTE CONTRABAND.

Destination.

(1) Territory belonging to or occupied by the enemy; (2) or to armed forces of the enemy; in both cases whether carriage of goods is direct or entails transshipment or a subsequent transport by land (Art. 30)—

(a) If goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy;

(b) If the vessel is to call at enemy ports only;

(c) If the vessel is to touch at an enemy port or to meet the armed forces before reaching the port for which goods are documented (Art. 31).

¹ Through the courtesy of the Secretary of the London Chamber of Commerce, I have obtained the opinions of a member of the London Corn Trade Association and of a member of the Baltic, both of great experience, who say that the Articles in question "must have been drawn up either with no knowledge or with very slight knowledge of the actual conditions of the trade." See Food Supply Commission's Report, Answers 2517-19.

CONDITIONAL CONTRABAND.

Destination.

(a) For the use of the armed forces or of a Government Department of the enemy State, unless in the latter case the circumstances show that the goods cannot be used for the purposes of the war in progress (Art. 33);

(b) Enemy's authorities (query whether an example of a) (Art. 34);

(c) A contractor established in the enemy country, who, as a matter of common knowledge, supplies articles of this kind to the enemy (Art. 34);

(d) Goods consigned to a fortified place belonging to the enemy or place serving as base, if found in a vessel bound for a territory belonging to or occupied by the enemy, or if the enemy country has no seaboard (Arts. 34 and 35).¹

One gain to neutrals may here be noted. Arts. 37 and 38 settle to their advantage and in harmony with continental doctrine a question much debated. It was a moot point whether a vessel which had carried contraband could be captured on her return voyage on the ground of her *delict* in her outward voyage. The decision of Lord Stowell in *The Margaret* (1 Acton 333) was to the effect that such capture was permissible. Art. 38 states explicitly that it is not. I might also include among the gains to neutrals a provision as to the liability of a ship carrying contraband. According to the English rule the ship is condemned if its owner is also the owner of the contraband or if he had knowledge of the contraband character. The Declaration adopts the French rule, according to which the result depends on the proportion of contraband, except that Art. 40 says, instead of three-fourths, more than half either by value, weight, volume, or freight. This, though seemingly harsh, as M. Renault admits, has at least the merit of clearness. I am bound to add that the advantage given by Art. 40 is somewhat cut down by Art. 41, which states that if a vessel carrying contraband is released because the contraband element falls short of one-half, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national Prize Court and the custody of the ship and cargo during the proceedings.

I come next to two omissions from the Declaration. No adequate reference is made either in the Declaration or in the accompanying report to the practice of pre-emption. It had become customary not to confiscate certain articles, e.g. articles which are the produce or growth of the owner's own country, and are usual articles of commerce; they were subject to

¹ I make no point of the fact that the tests overlap each other. These tables perhaps show that where simplicity is desirable there will be complexity. The tables do not distinguish between presumptions and complete proofs. Whether in actual litigation these distinctions are always observed, lawyers of experience will judge.

pre-emption. They were, in a sense, captured. But according to English practice, confiscation did not take place; the State, exercising the right of pre-emption, paid freight for the goods thus seized and the cost price, plus 10 per cent. This practice is not recognised. The neutral thus loses a considerable advantage which he enjoyed under English Prize Law. It is true that Art. 43 recognises pre-emption in the case of a vessel which, carrying contraband, is unaware of the outbreak of hostilities or of the proclamation declaring certain articles contraband. This express provision seems to exclude pre-emption in other cases. Art. 44 contemplates seizure of contraband without capture of the ship; there is no mention of payment; it may be destroyed.

This omission may have been inevitable. In any case it is to be regretted. There is force in the contention of many writers that the justifiable ends of belligerents would be attained if there was a right of detention of contraband. I may recall the fact that, in accordance with the general opinion of continental writers, the Institute of International Law in 1896 declared itself in favour of the abolition of accidental or relative contraband, subject to the belligerent's right of pre-emption on payment of an equitable indemnity. I am aware that there are objections to pre-emption, the chief being the increased incentive to ship contraband if there was practically no risk of capture without payment. But I cannot help thinking that the neutral has sustained some loss by the abandonment of this practice.

Upon another point no less important the Declaration is silent. According to the general practice in the seventeenth and eighteenth centuries of countries possessing colonies, it was not open to the subjects of other countries to engage in colonial or coasting trade. When a belligerent, unable to carry on its own colonial trade, permitted the subjects of neutral States to engage in that trade, England claimed the right to capture such vessels. The justification of such a stringent measure as given by Lord Mansfield in *Behrens v. Rucker* (1 W. Bl. p. 313), and Lord Loughborough in *Brymer v. Atkins* (1 H. Bl. p. 191), was that such neutral vessels had become in effect enemy's property; probably a straining of the facts in order to justify conduct deemed politic.¹ The ground put forward by Lord Stowell in defending the rule of 1756—perhaps more accurately described as the rule of 1789—was that the neutral was availing himself of an advantage given solely by reason of war, and was depriving the belligerent of an advantage which would accrue to him by success in war. "It cannot be contended," he said, in *The Immanuel*:

¹ See as to the injustice of the rule Mr. Justice Story's *Miscellaneous Writings*, p. 486; Wheaton's *Life of Pinkney*, p. 372; Duer's *Marine Insurance*, i. 763 n. The doctrine is, as Story points out (*Miscellaneous Works*, p. 488), a part of an older and more comprehensive doctrine "that every commerce with a belligerent is inhibitive to neutrals; for every commerce assists him in resistance and diminishes his necessities."

to be a right of neutrals to intrude in a commerce which has been uniformly shut against them, and which is now forced open merely by the pressure of war, for when the enemy, under an entire inability to supply his colonies and to export their produce, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war (2 C. Rob. 186).

I am not aware of any important countries which in these days claim a strict monopoly of their colonial trade. But several exclude foreigners from their coasting trade, and give to that a very wide significance. If one belligerent country invited or permitted neutrals to enter into that trade, would the rule of 1756 be applied to them by the other belligerent? We know that Japan in the recent war applied that rule in the case of the United States steamship *Montara*, which had engaged during the war with Russia in the fur trade from which previous to the war foreign vessels were excluded.¹ Eminent authorities who question the justice of the rule as applied to the colonial trade of a country defend its application to the coasting trade.² We also know that Germany and certain other Powers were in favour of accepting the rule. Art. 57 seems to contemplate the possibility of the revival of the rule. It states that the flag determines the neutral or enemy character. But it is added, "the case where a neutral vessel is engaged in a trade which is closed in time of peace remains outside the scope of this rule, and is in no wise affected by it." In short, the question remains an open one. It is, I think, to be regretted that this question was not settled one way or other, in view of the policy of certain countries not merely to monopolise their coasting trade, but to give to it a very wide meaning. At the same time, I have grave doubts whether a belligerent would court the consequences of the strict enforcement of such a rule. We must not forget that few neutrals in 1789 had powerful fleets, that modern military and naval science has put into neutral hands such weapons as torpedoes and submarine mines and, it may be, aerial instruments which no belligerent can afford to despise. There always exists in these days, if belligerent claims are pushed too far, a potential and formidable armed neutrality.

I do not propose to say much as to the doctrine of continuous voyage and the various stages of its evolution, which others will discuss. It is remarkable that a rule which as now formulated we did not think fit to enforce in wars in which we were fighting for existence, or during the Russian war, when goods were imported wholesale into Russia *via* Dantzic and other German ports, should now come into operation. It is no less remarkable that it should be adopted by a Government which two years before was in favour of the total abolition of contraband. I grant that, from the point of view of the belligerent, much is to be urged in favour

¹ *Das Japanische Prisenrecht*, Dr. K. Mastrand-Mechlenburg, p. 920.

² *E.g.* Mr. Justice Story, *Life*, i. 287.

of such an extension. His object is to intercept goods which may assist his adversary; and their destination and not that of the ship, it may be said, should determine their fate. Contraband, it is urged, will slip through his fingers in these days of railways and improved land communication if he cannot seize goods which go to the enemy *via* a neutral port. Obstructed by modern rules as to effective blockade and as to immunity of enemy goods carried on neutral ships, he naturally seeks to recover lost ground in two ways: by increasing the number of articles of contraband and by adopting the doctrine of continuous voyage.¹ I admit that there is a strong temptation to make this extension; but its recognition gives great scope to the action of belligerents. It also substitutes a vague test for one that is plain. Restrict contraband to traffic direct with belligerent ports, and the position of neutrals is clear. Depart from that principle, and there must be uncertainty.

VI.—UNNEUTRAL SERVICE.

Chap. iii. relates to "Unneutral Service." Art. 45 (1) deals with voyages "specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interests of the enemy."

Art. 45 (2) applies to cases in which "to the knowledge of either the owner, the charterer, or the master, she is transporting a military *detachment* of the enemy, or one or more persons who in the course of the voyage directly assist the enemy." Here there is a relaxation of the rules laid down by Lord Stowell in such cases as *The Orozambo* (6 C. Rob. 430), where he held that "number alone is an insignificant circumstance"¹ and that ignorance on the part of the master and, apparently, of the owners of the vessel, of the military character of the passengers will be no exculpation.

Under the new rule the carrying of one or two passengers who are on their way to assist the belligerent will not endanger the vessel, not even if the one or two comprised officers in high command.

It is not clear what is meant by "embodied in the armed or naval forces" in Art. 45 (1). As to this phrase the report says (p. 53):

Does it include those individuals only who are summoned to serve in virtue of the law of their country, and who have really joined the corps to which they are to belong? Or does it also include such individuals from the moment when they are summoned and before they join that corps? The question is of great practical importance. Supposing the case is one of individuals who are natives of a continental State and are settled in America; these individuals have military obligations towards their country of origin; they have, for instance, to belong to

¹ "Since fewer persons of high quality and character may be of more importance than a much greater number of persons of lower condition." In the case before the Court it appeared that three officers were on board.

the reserve of the active army at war, and they sail to perform their service. Shall they be considered to be embodied in the sense of the provisions which we are discussing? If we judged by the municipal law of certain countries, we might argue that they should be so considered. But, apart from reasons of pure law, the contrary opinion has seemed more in accordance with political necessity and has been accepted by all in a spirit of conciliation. It would be difficult, perhaps even impossible, without having recourse to vexatious measures, to which neutral Governments would not willingly submit, to pick out among the passengers in a ship those who are bound to perform military service and are on their way to do so.

Clear and conclusive answers to these interesting questions are not forthcoming; and it is not quite certain that a hundred steerage passengers returning home without concert in the same ship, in obedience to a call for their military service by their native country, would not be held to be within the terms of this article.

VII.—DESTRUCTION OF NEUTRAL PRIZES.

Art. 48 lays down as a general rule that a neutral vessel which has been captured may not be destroyed, but must be taken into port for adjudication. To this there is a comprehensive exception: "A neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of Art. 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time" (Art. 49). This is qualified by Art. 51; it is incumbent upon the captor to prove that he only acted in presence of an exceptional necessity such as is contemplated by Art. 49. There is a further restraint in the rule (Art. 53) that if neutral goods, not liable to condemnation, are destroyed with the vessel, the owner is entitled to compensation.

Whether a right of action or claim against a foreign Government, to be prosecuted at his own expense, would be satisfactory or always of much value to the aggrieved owner, is open to question. Even with these limitations the liability to abuses and the temptation to sink and burn may be great. Obviously, such rules would have sanctioned the operations of the *Alabama*, which, having no ports of her own open to her, systematically destroyed all vessels captured by her. It may be broadly stated that the cruisers of nations having no ports convenient or near would often, if not generally, sink or burn their prizes, and for obvious reasons. Under the Convention of 1907 as to Neutral Rights and Duties in Marine War (Convention XIII. Art. 4), a belligerent may not set up a Prize Court in neutral territory. Nor may a prize be brought into a neutral port (Art. 5) except on account of unseaworthiness, stress of weather, or want of fuel and provisions; and it must leave as soon as the circumstances which justified its entrance have ceased (Art. 21 of Convention XIII.). I am inclined to think that a Court

in applying such a rule as the above might interpret it in one way as to a State having colonies scattered all over the world, and consequently facilities for obtaining an adjudication, and in another way as to States which had no colonies or few, or only colonies lying remote. A tribunal might fairly say that it was legitimate for a Russian commander to burn prizes captured, say, in the Red Sea, but that similar conduct in the same waters on the part of a British cruiser, never more than a few days' steaming from a British port, the possible seat of a Prize Court, was unreasonable. I need scarcely add that if the "operations" in which a cruiser was engaged consisted of preying upon merchant vessels and avoiding conflicts with ships of war, almost every capture of a neutral vessel would result in her destruction; a commander could not reduce his fighting strength by drafting successive crews on board his prizes.¹

The English representatives, alive to this risk, endeavoured to obtain a declaration that mere inability to provide a prize crew was not an element of danger within the meaning of Art. 49. They failed. Their failure is significant.²

VIII.—TRANSFER OF PROPERTY.

Chap. v. relates to transfer of ships to a neutral flag. Here, too, differences have existed between our law and that of continental countries, and the Declaration adopts a compromise. The English rule is as follows: Sale of a ship is not invalid by the mere fact that it has been effected during hostilities or in contemplation of them. But it will be null if it is effected in a blockaded port, or in the course of the voyage, or if there is a reservation of any share or a right of repurchase. The onus of proving the *bona fides* of the sale lies upon the claimant (Memorandum, p. 40). The French rule is: "Le changement de nationalité des navires de commerce effectué après la déclaration de guerre est nul et sans effet. Le transfert antérieur à la déclaration de guerre, régulièrement intervenu, est valable" (Memorandum,

¹ See evidence of Sir Cyprian Bridge before Food Supply Commission, answers 11, 281, 11, 391.

² It is right to notice, as pointed out by Mr. Thursfield (*Trafalgar and other Studies*, p. 232 *et seq.*) that there is another side to the matter. Destruction of prizes "entails the loss of all prize money in respect of the ships so dealt with, and thereby eliminates one of the strongest motives which actuated the commerce destruction of the past. But, besides this, it requires the assailant to offer the hospitality of an already overcrowded ship to the crews of the vessels thus disposed of." The writer pictures the predicament of a cruiser which had captured an Atlantic liner, and must, consequently, take on board, feed, and house 2,000 to 3,000 persons.

I may point out that from early days it was found necessary, in consequence of manifold abuses, to prevent the destruction of vessels so as to avoid adjudication. The *Ordonnance de la Marine* of Louis XIV. contains strict prescriptions as to this (Valin, *Traité de Prises*, c. ix.). It is to be noted that power is taken under Art. 34 to destroy goods liable to condemnation, provided the circumstances are such as would justify the destruction of a vessel liable to condemnation,

p. 31). The English rule is theoretically not so strict; in practice it probably comes to much the same.

It is a strange thing, if one comes to think of it, that neutrals should be prevented from purchasing ships at such times as they think fit, irrespective of the interests of belligerents. But neutrals, we are told, must give way; higher considerations are here paramount: as an eminent judge, who never so far as I know indulged in irony, has said, "it is utterly impossible to enforce the belligerent rights of this country, except upon general principles, and all attempts to go upon purely equitable principles, particular decisions, and particular cases, without regard to the great principles, can only have the effect of destroying the right, and rendering it no longer worth the exertion which Great Britain used in times past for the purpose of protecting it" (Dr. Lushington in *Baltazzi v. Ryder*, 12 Moore P.C.C. p. 180). So much for "purely equitable principles."

As to ships, the general rule is that "the transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made *in order to evade the consequences to which an enemy vessel, as such, is exposed*"; obviously a difficult matter of inquiry. This right of transfer is cut down by the words which follow:

(a) There is a presumption if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities that the transfer is void. This presumption may be rebutted.

This same Art. (55) proceeds—

(b) Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid ~~it~~ it is unconditional, complete, and in conformity with the laws of the country concerned, and if its effect is such that neither the control of nor the profits earned by the vessel remains in the same hands as before the transfer.

(c) If, however, the vessel loses her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

Thus in sales of ships before hostilities there are three classes:

(a) Sales effected more than thirty days before the outbreak of hostilities, if unconditional and complete and in conformity with the laws of the country, and the bill of sale on board: valid.

(b) Such sales, if made less than sixty days before the outbreak of hostilities and bill of sale not on board: presumably void, but presumption rebuttable.

(c) Sales under class (b), if presumption rebutted, no right to damages.

Art. 56 deals with transfer effected *after* outbreak of hostilities. Here the presumption is reversed. Transfer is presumably "void unless it is proved that such transfer was not made in order to evade the consequences

to which an enemy vessel, as such, is exposed." There is, an absolute presumption of voidness—" (1) if the transfer has been made during a voyage or in a blockaded port; (2) if a right to repurchase or recover the vessel is reserved to the vendor; (3) if the requirements of the municipal law giving the right to fly the flag under which the vessel is sailing are not complied with."

The transfer of goods is dealt with partly, but only partly, by Arts. 58, 59, and 60. The first states that the neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner; but whether his character depends upon domicil according to the Anglo-American view, or nationality according to the continental, is left unsettled; it was impossible to arrive at an agreement. The articles annul the Anglo-American rule that "the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be."¹ We are left in doubt, however, whether Courts will apply the complicated rules and abstruse learning of the books as to commercial domicil, and whether, as seems be now possible, a man may have two domicils, and consequently be liable to have his property captured by two belligerents.

Art. 60 adopts the English rule: "Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded." It will be thus seen that there is a distinction between the sale of goods and that of ships: while the transfer of the latter during hostilities is not always and necessarily void, all such transfers of goods are null, the reason given being, in the words of the report, "the ease with which enemy goods might secure protection from the exercise of the right of capture by means of a sale which is made subject to a re-conveyance of the property on arrival has always led to a refusal to recognise such transfers" (Report, p. 61).

In one respect the new rule departs from the English rule; though not recognising liens, charges, etc., it recognises the right of stoppage *in transitu* in favour of a former neutral owner.

IX.—CONVOY.

Chap. vii. relates to convoys; as to which there has been a long-standing difference between England and continental countries, and one for which she battled stoutly in past times. She has hitherto declined to admit that the existence of a convoy was a ground of exemption from search (see the case of the *Elsabee*, 4 C. Rob. 408). This is now waived. Probably the concession is of small value; the practice of conveying

¹ Lord Stowell in *The Phoenix* (3 C. Rob. 21).

merchant vessels, once a marked feature of maritime trade, has lost its importance. It will be noted that the commander of the convoying squadron is apparently bound to give "all information as to the character of the vessels and their cargoes which could be obtained by search." Search would, of course, be a verification of the truth of the documents; whether this is intended I cannot say. No provision is made for what may happen if the commander has been misinformed or has been negligent as to the existence of contraband.

Chap. ix. makes provision for compensation if there were no grounds for seizing the vessel or cargo. There is no stipulation as to when compensation is to be paid—a matter of some consequence. Some Governments are unfortunately tardy, if not bad payers. Probably the Court, in its judgment, will give directions as to this point.

X.—SEARCH.

Chap. viii. deals with resistance to legitimate search. This involves in all cases the condemnation of the vessel. "The cargo is liable to the same treatment as the cargo of an enemy vessel," *i.e.* the neutrals who have cargo on board will be able to claim it under Art. 3 of the Declaration of Paris. Goods belonging to the enemy being on an enemy vessel will be confiscated. The same fate will befall goods belonging to the master or owner of the vessel.

CHIEF CONCLUSIONS.

I state briefly my chief conclusions. They are these :

That before the Declaration there prevailed much confusion, uncertainty, and diversity of opinion and practice as to the rules to be applied by Prize Courts ;

That the Declaration has harmonised and reduced to unity these rules, and has thereby facilitated the work of Prize Courts, national as well as international ;

That this is a great improvement upon the proposal contained in Art. 7 of the Convention for the Establishment of an International Prize Court, according to which "if no generally recognised rule exists, the Court shall give judgment in accordance with the general principles of justice and equity" ;

That many of the Articles of the Declaration are the result of compromises between conflicting doctrines, and that some of its defects are due to this circumstance ;

That the commentary contained in the General Report, while possessing a certain degree of authority, is not in all respects in full agreement with the Declaration ;

That the rules as to blockade are in the main reasonable; they effect a compromise between the interests of belligerents and neutrals, and between the Anglo-American and continental rules on the subject;

That these rules do not provide against possible measures in the nature of blockade by means of mines and otherwise, which might prove prejudicial to neutrals;

That, while reaffirming the modern doctrine that a blockade to merit respect must be effective, there is no security that the range of operations of a blockading squadron may not, under modern conditions of warfare, be so extensive as to impede the movements of neutrals;

That absolute contraband receives in effect an extension;

That the provisions for notice and for an appeal in the case of an addition to the list of absolute contraband are beneficial;

That conditional contraband is retained contrary to the opinion entertained in several countries;

That the existence of a free list is a distinct benefit to neutrals—a benefit which would be increased if there were provision for periodical revision at short intervals;

That, owing to the facilities which continental countries enjoy for receiving goods consigned to the ports of neutral countries, there will be practically no prohibition of the importation of conditional contraband into continental countries; that prohibition will exist only in the case of insular countries, such as England and Japan;

That the rules would tend to prevent the repetition of action in regard to contraband such as that of France in 1885 and Russia in 1904;

That it is vital to this country that the legal position of food-stuffs should be clear; that the present rule, as recognised by English law, is fairly well settled and reasonable; that their position will be somewhat uncertain under the proposed new rules;

That the practice of pre-emption, which protected belligerents against importation of contraband while it shielded neutrals against spoliation, is not retained;

That the rules as to destruction of neutral prizes may operate prejudicially to neutrals, and it may be, inequitably as between different belligerents;

That there will be in many cases a strong temptation to sink or destroy neutral prizes, and that such conduct will be often justifiable in the case of States having few or no colonies;

That the rules as to transfer of ownership, instead of being simple, as is desirable, are complex;

That some of the rules as to contraband and as to transfer of property adopt subjective tests as to intention which must necessarily give rise to uncertainty and controversy;

That important questions are left unsettled; the test of enemy character of owners is undetermined; and no clear light is thrown upon the

question, interesting in view of existing restrictions, whether the Rule of 1756 may be applied, and if so, to what extent or under what conditions.

I submit these considerations with diffidence. Whether the Declaration should be ratified with or without reservation is a question which I do not presume to answer. This much I may say: With all its defects the Declaration marks progress; the agreement by the representatives of the chief States of the world as to so many points long disputed means much for the future.

MARRIAGE AND LEGAL CUSTOMS OF THE EDO-SPEAKING PEOPLES OF NIGERIA.¹

[Contributed by NORTHCOTE THOMAS, ESQ.]

THE Edo-speaking peoples of the Nigerias, of whom the inhabitants of Edo, commonly called Benin City, are the best known representatives, occupy an area, roughly rectangular in shape, with its long sides pointing N.N.E., between Wari in the south and a line running from Isua in the Kabba Province, N. Nigeria, to Ida on the Niger, in the north; the total length is about a hundred and forty miles and the extreme breadth eighty miles. On the south the tribes are fringed by the Ijò; the Šekri intermingle with them on the south and west; on the west and north they have the Yoruba and their kinsmen, the Akoko; and to the east of the Akoko, the Igbira, who appear to have occupied the west bank of the Niger to the north of the Ibo in former times, but are now forced upwards, leaving some of the riparian area (from Agènegbòdi opposite Ida to Jigolo, often known as Iluši) to the so-called Kukuruku, who claim descent from the Sobo, now the most southerly representatives of this family of languages; from Jigolo the frontier runs diagonally in a south-westerly direction with the Ibo and allied tribes across the border, whose southern neighbours are again the Ijò, a riverain people intermingled to some extent with the land tribes belonging to other stocks.

The Edo-speaking family is divided into a few large and numerous small linguistic areas; the larger areas again are in some cases further subdivisible, the final result being a considerable number of distinct languages and dialects.

The largest and most homogeneous people in the family is the Edo tribe proper, commonly called Bini, though they do not accept the name; and so far as I can judge, the differences of language are small over the whole kingdom. North-east of the Edo lie the Esa (Ishans), formerly subject to them and more nearly allied to them in language than the other branches of the family; south of them lie the Sobo, with several languages and dialects but forming a stock which is physically fairly homogeneous. Finally, north of the Edo and Esa (Ishans) lie a congeries of tribes to which the name Kukuruku is often applied.

¹ The materials for the following paper were collected in the Nigerias during my tour as Government Anthropologist in 1909-10.

In the south-west of the Kukuruku area is the Ora group, larger and more homogeneous than any other; east of them lie linguistic groups, which are often contained in a single village, with languages sometimes unintelligible to their nearest neighbours; farther towards the Niger again the linguistic groups become larger, and in the Wefa country opposite Ida is a considerable population, claiming descent from a Sobo ancestor, with a common speech, which is also intelligible in Fuga and Uzaitui.

With such diversities of language it would be strange if there were not also great variety of custom and belief. The following pages will sketch the variations in marriage customs among the Edo-speaking peoples; to avoid misapprehension, it may be added that these variations are more pronounced in the case of marriage than in almost any other branch of custom and belief.

In the Sobo country the differences are mainly in the ritual leading up to the marriage, and in the regulations affecting the early months of married life; in the remainder of the area differences of status of the wife and children overshadow these ritual diversities and are, from the legal point of view, vastly more important. These differences may be summed up in the statement that there are two kinds of sexual relationships known—marriage (known as *amotia* union in the Kukuruku country) and concubinage (known as *isomi* union). These two forms may be found side by side, one or both being legally recognised; if only one form is found, it is rather what we should call concubinage than marriage. These statements may now be exemplified.

In the kingdom of Edo, now the Benin City District, a suitor may apply to a girl's father for her hand when she is quite small; or, if she is not betrothed then, some one may present himself when she is already marriageable. In either case payments either in money or in kind are required from the suitor, and, in addition, when the bride is young, the suitor does a certain amount of work on the farm of his future father-in-law and helps him in such tasks as house-building. A further duty that falls upon him later is attendance at the funeral of his father-in-law with contributions in kind to the expenses of the burial, of which the main feature is dancing.

The wife acquired by payment of bride-price is the absolute property of the husband; her children are his property and the eldest son is one of his heirs, or his sole heir if there is only one wife. The widow, if she has borne no children, passes to the son or brother of the deceased man. Adultery is a punishable offence, and the co-respondent may be mulcted in damages. The name given to a wife for whom bride-price is paid is *ame*, and the Edo believe that a purchased wife who fails to go to her legal husband will have to stand behind his chair in *elimi* (heaven) and serve him.

Side by side with this legally recognised form of sexual relationship is an irregular one in which neither of the parties has rights or duties, and

the children belong, at least in theory, to the woman's father, unless the relationship is subsequently regularised by purchase. In one case which came under my notice a girl bore two children to her lover, and was eventually purchased; at the outset lack of means had stood in the way of an ordinary marriage. In another case a widow went to live with a man in her father's village, but her father declined to recognise it as a marriage; she had borne a son to her first husband and this son was with her father: the case is therefore doubly curious. Probably investigation would have shown that the first "husband" had never completed the purchase; hence the son went to the woman's father; if she was not a widow, the husband *de facto* was bound to secure her by purchase; and in the absence of payment, the father refused to recognise him; the children would naturally remain in the house which was the common residence of the woman and her mate.

These same conditions—the regular marriage bond and the liaison—prevail to the north of the Edo tribe, in the Ifon District, save where, as at Okpe, the irregular tie is not permitted at all. It is not till we get to the kingdom of Agbèdè, in the Ishan District, that a change becomes noticeable. At Idegun, east of Agbèdè, it is rare for a father to take the bride-price from a suitor born in Idegun, though there is no objection to his accepting it from an alien. Consequently the majority of marriages in Idegun are of the type which we have called concubinage. The situation, however, is so far regularised, both here and elsewhere among the Esa, that in many cases the children of such a union are shared between the woman's family and that of the father. We may safely regard this as due to the influence of the marriage customs of the Kukuruku of Ida.

From Agènegbòdi westwards as far as Auči there are two recognised and legal methods of taking a wife, or, if we include the marriages in which the two parties are not of the same country, three.

Corresponding to the *ame* of Edo, we have the *amoiia* wife; she is purchased in youth, often as a result of the decision of a diviner, and frequently passes at once into the possession of the husband. Her children are the heirs of the husband, subject to the exceptions noted hereafter; at the death of the husband she remains in the family, and adultery with her was punishable by slavery or a fine of seven slaves.

In contrast to this, we have the *isomi* wife, who is, as a rule, acquired at a more mature age, though not necessarily at a lower price. At her husband's death she is free to go back to her own people; she may do so in his lifetime, subject to the condition that if she has borne him no children the bride-price must be repaid. If she dies, she must be sent back to her own family to bury—a rule that also prevails in Okpe in the case of a woman who leaves the community and takes a husband in another country. If her children die, they too must be buried by their mother's father, though occasionally the father seems to be gaining rights over them at the expense of his wife's family.

Adultery with an *isomi* wife is punishable very lightly; and the children of an *isomi* wife have to look to their mother's family for their heritage, save in two cases.

In the first place, a man may take the child of an *isomi* wife and pay the £30 necessary to make him a chief, a position formerly highly coveted owing to the immunity conferred by it against assault or imprisonment in daily life, or death or capture in war, but now coveted in the main because the fees of new chiefs are divided among the already existing *oke*. If a son is created chief by funds provided by his father, he is entitled to become his father's heir, provided he fulfils the other conditions, such as that he must have joined the *otu* or society of young men.

In the second place, after his father's death a man may elect to remain in his father's country, and by so doing he becomes *ipso facto* entitled to a share of the property. If, however, he subsequently removes to his mother's country, an action will lie against him for the return of the inherited property, especially of any widows whom he has received.

Occupying a position to some extent intermediate between the *amoiia* wife and the *isomi* wife is the *enabq* wife, a stranger from an alien land, for whom as a rule little or nothing is paid, but whose children remain with the father, and are on the same footing as those of the *amoiia* wife. On the other hand, if the husband dies, the *enabq* wife is free to go back to her own people.

In the matter of betrothal of daughters a man is free to dispose of those by an *amoiia* wife, either in *isomi* or *amoiia* marriage; if, however, they are by an *isomi* wife, the wife's father has a claim on a share of the bride-price.

Over the border, in the Ibie country of Northern Nigeria, as for example at Opèpe, we find the same conditions prevail; but here there seems to be a franker recognition of the fact that the *isogo* (= *amoiia*) wife is unfree, though in reality the position is the same elsewhere, inasmuch as no freedom of choice is ever left to the girl and the price cannot be repaid even if her husband is distasteful to her. The custom was, however, so far different that an *isogo* wife was always acquired from her owner, never from her father and mother.

The *enabq* marriage is also found here; but there is the curious proviso that a widow must either marry her husband's brother or return to her own country.

In the Upla country at Kominio we again find the two contrasted types, *ateme* (= *isomi*) and *onawateva* (= *amoiia*); but here the *ateme* wife is not, as has been the case in all the tribes dealt with so far, brought to her husband by conductors chosen from the families of her father and mother: the suitor calls together the men of his own company (*otu*) and they carry off the bride; according to another account, the husband's family carry her off.

At Soso the conditions are essentially different; the inhabitants are immigrants who fled from their original home before the Nupe raiders. The custom of child-marriage prevails here in a pronounced form, and, contrary to the usual custom, consummation takes place long before puberty, evidently a result of the original scarcity of women, another testimony to which is the rule that no woman leaves Soso to go as a wife to another country, though wives are brought in from outside as elsewhere.

The ordinary or *ofiko* wife is free to leave her husband if she dislikes him, and arbitrators fix the amount of the bride-price to be repaid for a truant wife who has borne no children. The *ofamisi* (= *enabọ*) wife is in like manner free to go when she has borne a child, and in both cases the children belong to the husband. Here, therefore, concubinage alone is found, but the children are in the position of the descendants of an *amoiia* marriage in the country to the south.

At Semolika much the same conditions prevail, save that marriage is postponed till puberty. A wife is fetched home by her husband's friends, but her own family accompany her, and the two customs already noted are combined.

Semolika is not very distant from Okpe, and in more than one point there is a resemblance between their customs. Punishment for adultery is unknown in both localities; but the injured husband must seek out the wife of the co-respondent and do likewise before the palaver can be considered at an end. If the co-respondent has no wife, the husband may wait till he marries, and in case of his death the duty devolves on one of his brothers; or a wife of the co-respondent's brother or father may serve as a substitute for the wife of the co-respondent. No member of the offender's family may object to the due performance of the custom, even though he himself is, as it were, a scapegoat for his brother's misdeeds.

In the Sobo country, as already noted, the conditions are essentially different. The wife here is the purchased wife, who is the property of the husband. The chief difference in ritual is that after the marriage the wife remains in her father's house for a longer or shorter period; her husband comes to the house at night and returns to his own house or village at dawn; at the end of about three months the wife is sent home in the ordinary way. This practice is a curious variation of a better-known custom in which the husband and wife reside with the wife's parents for a time and then remove; it also stands in close relationship to the custom which demands that till a child is conceived or born, the husband may only visit his wife by stealth. In the Sobo country the husband eats food in the house, and there is no concealment.

In some parts, as a variation, the wife goes to her husband's house, but returns to her father's house for varying periods, often more than once; we may regard this practice as a derivative of that just mentioned. No explanation was ever given to me of either; but as a wife sometimes returns

to her father's house to bear a child, we may probably regard both customs as variants of MP. marriage.¹

One or two further points may be noted. In parts of the Esa country a daughter is sometimes compelled or permitted to occupy her deceased father's house, and to receive there as many lovers as she chooses; at her death the house becomes the property of one of her children.

The customs with regard to illegitimate children born to a woman before marriage occasionally illustrate the indifference to paternity which is characteristic of some uncultured races. Such a child often goes with the woman to her husband, whether he is the father or not; and it is by no means infrequent for such a child to reckon as the eldest son and take all the property, to the exclusion of the children begotten by the husband. With posthumous children the custom varies; sometimes it is the heir of the father *de facto*, sometimes such a child takes its place among the children of the second husband, ranking according to age.

Closely connected with the subject of marriage is that of the inheritance of property. The general scheme of inheritance among the Edo-speaking peoples is that the children of a man are his heirs; but this is liable to important modifications on some points.

Before dealing with these it may be said that where the children succeed there are, broadly speaking, three possibilities. In the first place the property may be divided among all the children; this is rare. In the second place it may be divided among the sons; this also is not common. In the third place it may go to the eldest son; and this is the normal course of events. This broad scheme, however, must be limited in more than one direction. In a country where polygyny is the rule, two-thirds of the married men in some districts having more than one wife, it often happens that the eldest son of each wife gets a share of the property, though not so large a share as the eldest son of the head wife.

Again, if the sons are all minors, the father's brother may be the heir, or he may act as guardian; or, finally, he may hold an intermediate position, with authority to sell or otherwise deal with some of the property, and the obligation of accounting for the remainder, or with only a nominal position as guardian and practical freedom to use the inheritance for his own ends.

Turning now to the cases in which the eldest son is not the heir, even though he has, according to our conceptions, reached manhood, we find that they fall under three heads.

In the first place, if the father has no *amoiia* wife and does not make an *isomi* son a chief, the latter is not his heir; he succeeds to the property of his mother's brother, unless he elects to remain in his father's country.

¹ I suggest this term (MP.=matrilocal—patrilocal) in the place of "removal" marriage, to indicate that a change of residence takes place from the wife's group to the husband's.

In the second place, he is not even then the heir, unless two other conditions are fulfilled, which also apply to the son of an *amoiia* wife. He must have joined *otu*, one of the companies of young men, which is entered between the ages of twenty-five and thirty among the Kukuruku of Ida, where this regulation is found; not only so, but he must be the eldest in the family made up of his father's brothers and nephews, otherwise one of the latter takes the property, to be succeeded later perhaps by the actual son of the dead man.

In the third place it may happen that a child who is not the son of the dead man, nor even of a member of his family, may in some communities become his heir. The position of posthumous children is not well defined, or rather it is subject to variations from place to place. Occasionally, however, a posthumous child reckons as the eldest son of the second husband, though the ordinary rule is that a widow must wait for a year before re-marrying. Similarly, an illegitimate child brought by a woman to her husband seems occasionally to rank as his eldest son, even though he is not his father. Finally, in what I term "penal adoption" a child of another family may take a deceased man's property to the exclusion of his own children.

Over a considerable part of the territory of the Edo-speaking peoples it is the rule that a murderer must suffer death, unless he or his family can hand over two persons to the family of the deceased man. If they can find these two persons, the latter enter the family of the deceased man; they are liable to all the restrictions with regard to marriage which fell upon him, and sacrifice to their adopted not their real parents. In some districts if the adopted child takes the place of the eldest son, he is also the heir, but this rule is not invariable.

As regards the position of women in matters of inheritance, there is less to be said. Daughters occasionally share jointly with sons; sometimes they are heirs in the absence of sons; but the ordinary rule is that they can only take certain kinds of property, such as beads or cloth; and the gift of these may be left to the discretion of the male heir or heirs.

A woman's property is inherited as a rule by her children, sons and daughters or only sons; in their absence the husband is sometimes the heir, more often the property goes to the brothers or sisters of the dead woman. It may be added that a wife never succeeds to her husband.

The only kind of adoption which has any effect on inheritance of property besides the above-mentioned penal adoption is limited to certain communities. It is sometimes the practice for a childless woman, if she has much property, to make the king of a people her heir; he is then under the obligation of burying her and of course takes her property.

In connection with inheritance something must be said with regard to the descent of land. As a rule land is communal; it passes into private

hands when it is cleared and cultivated ; but when the normal two years of cropping is over, it is allowed to lie fallow and the former cultivator has no claim to it, though kola trees may remain in his hands if he maintains a small clearing round them. In the Sobo country, however, land is owned by families as a rule, though there is land also within the village territory which is still communal and can only be used if it is granted by the chief. Each "great family" has its own area, however, from which it clears a large farm each year, the clearing being subsequently shared among individual cultivators. Married men have their own small farms ; unmarried sons usually cultivate jointly.

In the north of the Edo-speaking territory private ownership is occasionally found ; and sometimes the headman of the community is regarded as the owner. At Soso, bought land and inherited land descend according to different rules.

Reaches of rivers and fish swamps are in some parts private property ; but it is rare for these tribes to live near the water and such cases are infrequent.

Many trees are private property, especially kola and cocoanut ; if they are found in the bush they may be made private property by the finder, if he wishes. Oil palms, on the other hand, are rarely private property ; and at Otua I was told that they were now communal, though formerly private property in them was universal, and at no very distant date.

Both trees and land may be sold in some places ; pawning is also permitted, and it is natural that the areas in which this occurs should be those in which private property in land is most developed. Where uncultivated land is communal, it is rare to find the sale or leasing of trees, though private property in the latter is fully recognised.

On the whole, one is struck by the differences between adjacent areas and even between villages of the same district. Unless the Edo-speaking peoples are exceptional, the task of giving an adequate account of the customs of a people low in the scale of culture is a more difficult one than is commonly supposed. The tendency of anthropology is towards the intensive study of small areas, and the results of my recent tour fully justify this attitude.

THE MODERN CONCEPTION OF CIVIL RESPONSIBILITY.

A STUDY OF COMPARATIVE LAW.¹

[Contributed by P. B. MIGNAULT, ESQ., K.C. (*Montreal*).]

It is perhaps only natural in this industrial and inventive age that questions of liability for accidents, and generally of the responsibility for civil torts, should engross the attention not only of jurists, but also of economists and sociologists. The conditions of life are changing every day, new forces of nature are being discovered and developed, and we are environed by perils our fathers did not even dream of. The industrial employee has become but a piece of living mechanism, surrounded by rapidly moving machinery of tremendous power, and the utmost care will not, and cannot, prevent the occurrence of disastrous accidents. Old safeguards are now discarded for new ones of possibly doubtful utility, and the necessity of rapid production has induced both operatives and employers to take chances and to trust to Providence to escape danger. Statistics teach us that the soldiers of industry furnish more victims than the soldiers of war, that, according to the law of averages, a certain—and, I think, largely increasing—proportion of workers are sure to succumb, and that in some occupations the limit of human life is considerably shortened.

It is obvious that old rules of liability, devised at a time when production was slow, when tools were set in motion by the workman who used them, are necessarily inadequate to meet the modern conditions of industry. To adhere blindly to these rules would appear as unwise as to expect wooden ships of war to withstand the artillery of our day. The law must necessarily advance to be a living system, but its progress is generally deliberate and slow. And in the domain of legislation experiments are not always successful, and there is, and has always been, a tendency to stretch an old rule rather than to frame a new one. The result has been—and I think it was an inevitable result—that there has been an undue straining in some countries of old canons of law, while elsewhere a spirit of conservatism and a too rigid jurisprudential system have rendered any progress impossible save

¹ Read at a Conference of the International Law Association at the Guildhall, London, August 3, 1910.

by new and often untried legislation. I think that no more interesting study can be made in comparative law than a study of the means employed under different systems of jurisprudence to meet and cope with new situations. And I shall make bold to-day to crave your attention and your kind indulgence while I consider the questions of civil liability which have arisen, more especially in France and in England, during the last quarter of a century. I can hope to say nothing new, while I must perforce repeat what has been said, and admirably said, by others; still the subject is of itself so interesting, palpitating as it does with human interest, that I flatter myself that any repetitions will not prove distasteful.

The classic rules governing civil responsibility, since the days of Rome, are that there is no liability without a fault, and that he who uses his own right injures no one. The laws of both France and England, with regard to torts, were based on this fundamental notion, which for ages was applied without any apparent difficulty or complaint. But the world has moved: and the new situation which I have mentioned has demanded a solution. I will answer the simple question: how was that situation met in France and in England? In other words, how did the civil law on the one hand and the common law on the other solve the same problem?

In France, for centuries, and more especially for at least seventy-five years after the Civil Code was enacted, the rule was the same as in England, and negligence or fault was the all-essential condition of an action *quasi ex delicto*. This rule is well stated in Art. 1382 of the Code Napoléon: "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer."

The following articles of the Code seem merely to amplify and illustrate this simple rule. Thus Art. 1383 states that "chacun est responsable du dommage qu'il a causé, non seulement par son fait, mais encore par sa négligence et par son imprudence." And the first paragraph of Art. 1384, it would seem evident—but appearances are sometimes deceptive—merely carries out the fundamental rule that there is no liability without a fault, either personal or through another, when it adds: "on est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde."

These provisions, of general application, are followed by some special rules supposed to carry them out. The whole together forms the common law of France with regard to negligence.

As I have already said, for more than three-quarters of a century after the promulgation of the French Code it was constantly held that no action in damages could be maintained without evidence of fault, the onus of proof of which was on the plaintiff. And as late as 1898 we find the following declaration by a French Court: "La responsabilité du patron envers l'ouvrier victime d'un accident au cours du travail qui lui était confié,

était régie exclusivement, avant la loi du 9 Avril 1898 [the French Workmen's Compensation Act], par les Art. 1382 et suiv. C. Cil., qu'en conséquence, l'ouvrier ne pouvait faire peser sur le patron la responsabilité de l'accident dont il avait été victime qu'à la charge d'établir une faute imputable au patron." ¹

It was therefore uniformly held that there was no responsibility without fault, that there was no fault unless there was an illicit act, and consequently that he who made use of his right incurred no liability, however great the damage suffered thereby might be.

This was merely giving effect to the old Roman rule "*nullus videtur dolo facere qui suo jure utitur*" which the old French jurisprudence expressed by the maxim "Icelui n'attente pas qui n'use que de son droit." ²

No doubt this rule was found to be harsh in many cases. An unsuccessful litigant is rarely consoled when told that the law is a hard one but that it is nevertheless the law, *dura lex sed lex*. And when the injury thus done is not limited to an isolated litigant but is suffered by a large and influential class, the question arises whether the law is really as it has been construed, and if there be no doubt that the law has been correctly stated, whether it should not be changed.

So the chief sufferers by accidents being the working classes, and statistics showing that at least one-half of the accidents are the result of unascertained or unascertainable causes, in which case no clear fault can be demonstrated, it followed that in at least one case out of two the workman was without remedy.

The obvious result of such a state of things was to start an agitation against the law, or to say the least against its strict application. This agitation had a double effect. Demand was made that the law which worked so harshly should be changed. And, at the same time, those to whom was entrusted the study or the application of the law were led to inquire whether the legal propositions which had been universally recognised were really in conformity with the spirit or even the letter of the law.

It is this latter inquiry that to my mind has had the most pregnant results, and has produced a legal evolution that could almost be called a legal revolution.

I have given the text of the first paragraph of Art. 1384 of the French Code, which I may once more repeat as the new construction given to this provision has radically changed the jurisprudence of the French Courts: "On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde."

Let me append, and use for the purposes of this discussion, the English version of the corresponding paragraph of Art. 1054 of the Civil Code of the Province of Quebec which, more than Art. 1384 of the Code Napoléon,

¹ Sirey, 1899, 2, 197.

² Art. 107 of the Coutume de Brétagne.

lends itself to the new construction: "He (that is to say every person capable of discerning right from wrong) is responsible not only for the damage caused by his own fault, but also by the fault of persons under his control and by things which he has under his care."

Therefore the law seems to render every person capable of discerning right from wrong responsible for the damage caused:—

- 1st. By his own fault ;
- 2nd. By the fault of persons under his control ;
- 3rd. By things which he has under his care.

Apparently the latter words had been overlooked by the French Commentators, although Laurent, in his monumental work, vol. xx. No. 639, had expressed the view that they might give rise to a presumption of fault. But in 1897, two brilliant jurists, MM. Raymond Saleilles and Louis Josserand, in two monographs published almost simultaneously,¹ claimed that under Art. 1384 of the Civil Code all persons having the care of things are liable for the damage caused by such things, this liability being derived from the law alone, irrespective of any idea of fault.

I am not now concerned with the question whether this new construction put on an old law was or was not warranted by its terms. It would even seem idle now to say that it was probably a forced construction, that according to the intention of the authors of the law the idea which dominates the whole subject is the idea of fault, and that the provision making the person having the care of an inanimate thing (if truly one can have the *care* of an *inanimate* thing) responsible for the damage thereby caused, should be restricted to the special cases mentioned in the following articles, damage caused by an animal, and damage resulting from the fall of a building. All discussion of the merits of the abstract question seems to me to be now useless, inasmuch as the system advocated by MM. Saleilles and Josserand has received the judicial sanction of the highest Courts of France.

A few examples taken from recent decisions will, I think, prove interesting.

In a case reported by Sirey, 1906, part ii. p. 46, some children were killed by the explosion of a threshing machine worked by steam. There were certainly circumstances connected with the accident sufficient to show negligence, but the Court of Appeals of Chambéry based its decision chiefly on the abstract principle that responsibility for the damage caused by a thing "n'est pas subordonnée à l'idée subjective de faute, comme dans les Articles 1382 et 1383, mais bien à l'idée objective de dommage."

The next case to which I will refer is a very interesting one. A balloon was passing over Paris when a sudden storm made it descend in spite of the efforts of its pilot, who nevertheless succeeded in keeping it in the air with the hope of landing in the Bois de Vincennes near by. While the

¹ Raymond Saleilles, *Les accidents du travail et la responsabilité civile*, Paris, 1897 ; Louis Josserand, *De la responsabilité du fait des choses inanimées*, Paris, 1897.

balloon was thus passing over the houses, some people got hold of the guide rope, and notwithstanding the objections of the pilot, forced him to land in a narrow street. The pilot immediately cried out to the people in the houses to close their windows and to cease smoking. It appears, however, that some persons cut with knives or other instruments the covering of the balloon, so that the houses became filled with gas and an explosion soon occurred, killing one man and wounding several others. It was held by the Court at Paris that the balloonist was liable for the accident, but the damages were reduced on account of the circumstances of the case (Dalloz, 1907, part ii. p. 17). The rule, conceived to be stated by Art. 1384, was too strong to be overcome by the defendant.

The third case, a decision of the Court of Appeals at Amiens of January 24, 1907, was an action in damages by the representatives of a man killed while operating a threshing machine worked by horses. A wheel had broken and a flying piece had fractured the skull of the victim. It was held that under Art. 1384 there was a presumption of fault which could only be rebutted by showing that the accident was the result of *force majeure* or of the fault of the victim. The Court refused to allow evidence of facts which would have shown that the owner of the machine was without negligence (Sirey, 1908, part ii. p. 59).

The fourth case went before the Cour de Cassation, whose decision was rendered on March 25, 1908. Fire had been discovered in a threshing machine operated by steam, and had been seen to fall to the ground. A few moments after, some hay was destroyed. The Court decided, from the sole fact of the fire having originated in the threshing machine, that a presumption of negligence arose which the defendant could only rebut by showing that the machine was not under his care or the care of his employees at the time of the fire, or that the fire was the result of a *cas fortuit* or of a *force majeure* or any other exterior cause (Sirey, 1910, part i. p. 17).

It must be said that, at the present moment, the precise extent of the new doctrine is not absolutely ascertained. In its mildest form it admits of a presumption of fault, dispensing the plaintiff from proving anything save the accident and the damage suffered by him, which presumption, however, can be rebutted by the defendant by showing the absence of fault. I must, however, add that this view (which apparently was taken by certain judges of the Supreme Court of Canada in the case of *The Shawinigan Carbide Co. v. Doucet*, 42 Can. S.C.R. 281), is not the prevailing view in France. As far as an outsider can judge, it is now held that the defendant in a damage action cannot rebut the legal presumption of fault by proving that he was himself free from all negligence, but he must show that the accident was caused by a *cas fortuit* or a *force majeure*, and by some decisions he is left only the slender chance of escaping from a condemnation by proving that the damage was caused by *vis major*, that is to

say, by an act which the English version of our code defines as irresistible force, and which is called in English law an act of God.

And some French jurists go even further, and say that now that the principle of personal responsibility for all prejudicial acts is recognised, the Courts can discard, as a useless crutch, the rule of Art. 1384, that one is responsible for the damage caused by things which he has under his care. And in an article by M. Georges Ripert (in *La Revue Critique de Législation et de Jurisprudence*, 1907, p. 214) we find it laid down, as the natural outcome of the legal evolution I have endeavoured to trace, that "la responsabilité du fait des choses ne sera que le résultat d'un principe plus large, la responsabilité du fait personnel. On sera responsable des choses qu'on a créées, ou qu'on s'est appropriées, ou qu'on a aménagées, sauf à tenir compte du rôle joué par la victime et qui peut être plus ou moins considérable, suivant l'inertie de la chose. On ne peut donc pas parler exclusivement de garde, de surveillance, de profit, de propriété. Il faut toujours retrouver le fait personnel, remonter à l'activité, source première du risque. C'est avec raison que l'on a critiqué un principe qui ferait peser sur la propriété des choses une présomption de responsabilité. Il n'y a pas de responsabilité du fait des choses. Il y a une responsabilité personnelle qui est augmentée parce que l'appropriation et l'aménagement des choses extérieures augmentent notre puissance, notre activité."

The last system is sometimes called the system *du risque créé*, because, according to its advocates, the mere creation of a risk engenders responsibility. They argue thus: "Celui qui, pour son agrément ou pour son profit, introduit dans la société une chose dangereuse, fait courir à ses semblables un certain risque. Ainsi une machine à vapeur éclatera peut-être et blessera ou tuera quelqu'un sans qu'aucune faute ni même aucune imprudence puisse être reprochée au propriétaire de la machine ou à celui qui en a eu la garde, la cause de l'accident demeurant toujours ignorée. N'est-il pas juste que ce risque soit à la charge de celui qui l'a fait naître, c'est-à-dire de celui qui en a la garde, conformément à la règle: *ubi emolumentum ibi onus*?"¹ And we are told that this system is gaining ground every day.

Of course, where a dangerous work is being carried on, or where a person accumulates on his own property elements or forces that will prove dangerous if they are allowed to escape, it may be possible to predicate liability as a consequence of the creation of risk. And I think that I shall be able to show that there is authority, even in English law, for this statement. The difficult point will always be the question of fact, that is to say whether the work or machine is a dangerous one, and opinions may differ as to a steam boiler coming within this category. However, it is not my purpose to criticise, but rather to ascertain what doctrines are now held in France and applied by the Courts, and the system of the *risque créé*,

¹ MM. Baudry-Lacantinerie et Barde, *Obligations*, 3rd ed., vol. iv. p. 692.

especially as defined by M. Ripert, seems to me the very last stage of the evolution or revolution which I have endeavoured to describe.

There is another question which I should perhaps mention, and which has been raised in these days of extraordinary activity which the modern school of jurisprudence in France is now showing. Can a person, while exercising his right, incur responsibility? There is much difference of opinion on this point, but there is certainly some authority for an affirmative answer. Thus the building of a false chimney on a roof to take away the light from a skylight of a near-by house, the erection of a high screen to satisfy the builder's spite against his neighbour, have been enjoined against by the Courts. I can, however, do no more than mention this question, which of course cannot be overlooked when discussing the modern ideas of liability, but which I could not properly discuss within the limits assigned to this paper.

But I think enough has been said to show that, in France at least, new principles of responsibility are enunciated and that there is a serious effort to cope with the changed conditions of modern life.

So far as liability for accident is concerned, there has certainly been an advance, and if the future victim of any accident could choose the place where the mishap is to occur, he would be wise to locate it in France rather than in England. In the latter country, before 1880, two formidable obstacles blocked his way: the defence of common employment, applicable, of course, only to employees, and the defence of contributory negligence which could be set up against any one.

While I naturally feel very diffident in expressing an opinion on this subject, I will nevertheless make bold to say that, before the Employers' Liability Act, 1880, the doctrine of common employment stood on no better foundation—but I confess that it was a very solid one—than the rule *stare decisis*. In fact, I do not know that a more remarkable example of judge-made law can be found in the whole domain of jurisprudence. As a defence it was, I believe, first enunciated in the case of *Priestley v. Fowler*, decided in 1837 by the Court of Exchequer,¹ and it ceased to be a debatable question when it was adopted by the House of Lords in the cases of *Bartonshill Coal Co. v. Reid* (3 Macq. H.L. Cas. 266, 1858) and *Wilson v. Merry* (L.R., 1 App. Cas. 326). I think that no one now will contend that the reasons given by the Courts are in any way satisfactory and convincing. It was said that the employee, knowing that he was to be associated with other workmen, tacitly assumed the risk of injury due to the negligence of his co-workers; that had he not been willing to take these chances of danger, he should have refused to do the work entrusted to him; and that the employer, not being usually present in person, had no means of preventing the negligent acts or omissions of his servants. But as Judge Ruegg (*Employers' Liability and Workmen's Compensation*, 7th ed. p. 11),

¹ 3 M. & W. 1.

says: "It is not difficult to discover the unsoundness of such a system of reasoning. The workman makes no contract to take consequences of the negligence of his fellow workmen; he would be generally very unwilling to do so. The only ground for implying such assent is that he has entered into association with others upon work in the course of which he knows there is risk of injury arising from the negligence of those with whom he thus places himself in contact. If, from this knowledge of risk, a contract to exclude the principle of *respondeat superior* is to be implied, then it should be implied in the case of passengers upon railways and other public conveyances, and, indeed, in the case of every one who voluntarily subjects himself to the ordinary dangers of street traffic."

Of course, from the moment that the principle was admitted by the House of Lords, it became part of the law of England, and probably, of the law of all countries owing allegiance to Great Britain. It was even adopted by countries like the United States, who, although governed by the common law of England, were certainly not bound by decisions rendered three-quarters of a century after their separation from the British Crown. And the fellow-servant principle having been recognised, it was pushed to extremes which, we can imagine, would have scarcely commended themselves to its originators, so much so that a railway employee might have no recourse if injured through the negligence of another employee working miles and miles away, and whom, of course, he had never seen.

It is scarcely necessary to add that no such doctrine as the fellow-servant doctrine was ever admitted in the civil law countries and especially in France. There the rule expressed in England by the maxim *respondeat superior* was applied whether the victim of a servant's negligence were a workman or a stranger. And doubts have even been expressed—although I think the contrary view is supported by authority—whether an employer could, by express contract, exclude liability for injuries caused by the negligence of his servants. At all events, no such tacit contract can be presumed, and, as we have seen, the tendency of the new school of jurisprudence is to relieve the plaintiff from the obligation of proving any negligence at all.

Another obstacle in the way of an English plaintiff in an action *quasi ex delicto* is the defence of contributory negligence. Of course this term implies that the defendant has been guilty of some negligence, but that the plaintiff has also been negligent, and that the injury is the direct result of their combined fault. In such case, in France, and I think in countries which follow the civil law, each party suffers in proportion to his fault. In other words the damages are divided, and if the plaintiff has been equally negligent with the defendant, his compensation is cut down by half. This system, at least to a civilian, certainly seems more reasonable than the prevailing doctrine in common law countries.

On the other hand the rule *res ipsa loquitur*, as applied in England, bears some resemblance, though very distant, to the French system of presuming

fault where damage is caused by an inanimate object. Of course, this rule only applies in England when the accident is of such a character that it is reasonable to presume that it was caused by the negligence of the defendant. In France, the new doctrine is universal in its application; *res ipsa semper loquitur*.

And, while I am mentioning this rule, I am reminded of a principle which is recognised in England, and which suggests to my mind a kind of distant relationship with the theory of abuse of rights. I refer to the dictum of Blackburn J. in *Rylands v. Fletcher*, which was approved by the House of Lords (L.R. 3 H.L. 330):

We think that the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is trodden down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things brought be beasts, or water, or filth, or stencils.

Comparing now the French and English systems, I may, perhaps, be permitted to observe that we have here a curious example of the fallacy of the objection often urged against codification, that it retards the progress of the law by restricting it within too narrow limits. In France, the Code is so construed as to keep pace with the extraordinary development of this industrial age, so much so that as dangers increase, as conditions of liability necessarily widen, the rule drafted more than a century ago is found adequate to meet cases of which the framers of the rule did not even dream. In England, in spite of the greater flexibility possessed by its judicial system, the rules governing liability have become more and more stringent as the necessity of a liberal principle of responsibility became more and more obvious.

In view of the inadequacy of the common law in England to meet

the new conditions of industrial development, an appeal to Parliament was the only remedy. The Factory Acts, in so far as they required the protection and fencing of machinery, were, I believe, first enacted in 1856, and brought about some modification of the doctrine of common employment, for where the master had neglected to provide a safeguard required by statute, and, as a result, an accident occurred by the negligence of a workman, the action of the victim could no longer be met by the plea of common employment.¹

This, of course, was some palliation, but in the vast majority of cases the fellow-servant rule still held sway, and its extensive application by the Courts created wide-spread dissatisfaction. The usual course was followed, and a parliamentary committee was appointed with instructions to inquire into the whole matter. The result of its report was the passing by Parliament of the Employers' Liability Act, 1880, which practically, if not absolutely, did away with the plea of common employment, placing the servant, when suing for injuries, in as advantageous a position as a stranger. The fellow-servant doctrine had been applied during more than forty years, and I think it left no mourners when it finally disappeared. Naturally the other parts of the Empire, which had followed England's lead in enforcing the rule, were not slow to follow its example in repealing it. In the United States, however, I believe the plea of common employment is still available to the master.

The Employers' Liability Act, therefore, gave the same remedy to workmen as to the rest of the public. One of the obstacles with which they had been forced to contend was removed, but in all other respects they were placed in the same position as any plaintiff in a damage action, and obliged to prove the cause of the accident, its delictual or quasi-delictual character and its prejudicial effect. Their claim could still be defeated if it were shown that they had been guilty of contributory negligence.

It was only in the latter respect that the law of torts in England, after 1880, was less favourable than the civil law system as it was then applied. Under both systems fault had to be demonstrated by the plaintiff, and this was no easy task. For statistics show that nearly one-half of the total number of industrial accidents result from dangers inherent to the work, and consequently by no fault of the employer. In many other instances the minutest inquiry has failed to reveal the cause of the mishap. Therefore, roughly speaking, in fifty cases out of one hundred, leaving entirely out of the question the cases of contributory negligence, the plaintiff's action was doomed to failure.

I am not discussing here whether it is or is not fair that the workman should assume the risk of his employment as the soldier takes the chances of death or of injury in battle. There is perhaps a certain parity between the two cases, especially with regard to the often inadequate remuneration

¹ *Groves v. Lord Winborne* (1898), 2 Q. B. 402.

which is paid for the risk undergone, if not with respect to the motives which animate the soldier of industry and the soldier of war. What can be granted, I think, is that it is in the public interest that those who suffer injury, and the needy dependents of those who suffer death, should not be thrown upon the charity of their neighbours or of the public. On the other hand, the principle that the industry which profits by the labour of the employee should assume in some degree, and probably jointly with the workman, the risk of injury to life and limb, as undoubtedly it assumes the chances of breakage in the machinery, has, it is asserted, much to recommend it from the standpoint of substantial justice. That these considerations have some weight is clearly shown by their general application in the domains of legislation.

What is absolutely certain is that the principle of professional risk became a part of the law of nearly all civilised countries, about the beginning of this century. As defined by the present Prime Minister of Great Britain, it suggests the much-discussed decision of the House of Lords in this case of *Rylands v. Fletcher*, mentioned above, for Mr. Asquith says: "Where a person, on his own responsibility and for his own profit, sets in motion agencies which create risk for others, he ought to be civilly responsible for the consequences of what he does."

This principle was probably first recognised in Germany, whose example was followed by England in 1897, by France in the following year, and by the greater part of the British Empire and the Continent of Europe.

The new Workmen's Compensation Act, 1906, in England, is probably the widest, or at least one of the widest, measures providing for compulsory compensation of workmen that is now on the statute-books of any nation. In some respects it certainly goes much farther than the French law or its almost exact copy, the Workmen's Compensation Act, 1909, of the Province of Quebec, the most recent, I think, of the laws founded on the doctrine of professional risk.

A very shrewd observer (M. Sachet) remarks that the compensation laws of different nations reflect the national characteristics of the people by whom they have been enacted. Everything, he says, is most minutely regulated in what he calls the German group, that is to say, Germany, Austria, and Norway; the compensation is provided for by means of insurance, and the cost of this insurance is borne in Germany by the employers and in Austria by both workmen and their masters.

Great Britain, and I may say her Colonies, on the contrary, leave everything to the initiative of the workmen on the one hand, and of the employers of labour on the other. A scale of compensation, in case of accident, is compulsory, but no special guarantees, such as insurance or funds deposited with the Government, are provided. The workman has to consider whether or not his employer is financially in a position to pay him the compensation which, under the law, he is entitled to claim.

Finally the French group (comprising France, Italy, Belgium, and generally those countries governed by the civil law, and I include therein the Province of Quebec in Canada) has a compulsory scale of compensation, and also a guarantee fund, created, under the control of the Government, by all the industries protected by the law. This is the French system, and somewhat different schemes of guarantees exist in the other members of this group, there being in the Province of Quebec no guarantee fund, but an option allowed the workman to require the purchase of an annuity from an insurance company authorised by the Government.

I do not think that I should go into any further details in comparing these different laws. They are all founded upon the same basic principle, that of professional risk, and each country has solved the problem according to its own views of its obligations towards its citizens. They indicate unquestionably an advance towards the recognition, generally, of a wider principle of civil responsibility.

It goes without saying that the new system has met with much criticism. Thus Mr. Dicey, in his able work on *Law and Opinion in England*, p. 282, says :

This legislation bears all the marked characteristics of collectivism. Workmen are protected against the risks of their employment, not by their own care or foresight or by contracts made with their employers, but by a system of insurance imposed by law upon employers of labour. The contractual capacity both of workmen and of masters is cut down. Encouragement is given to collective bargaining. The law, lastly, secures for one class of the community an advantage, as regards insurance against accidents, which other classes can only obtain at their own expense, and, though it is true that the contract of employment is still entered into directly between masters and workmen, yet in the background stands the State, determining in one most important respect the terms of the labour contract. The rights of workmen in regard to compensation for accidents have become a matter not of contract but of status.

It would be idle to deny that there is some ground for this criticism. Yet, as Mirabeau once said on a momentous occasion : "quand tout le monde a tort, tout le monde a raison." The world may have gone mad, but there is certainly not room in the mad-houses for all the believers in the principle of workmen's compensation. The rather remarkable circumstance connected with the enactment of the French law is that it came at the very moment when the Civil Code, as construed by the Courts, gave ample protection to the working classes. And it may well be doubted whether it has been an advantage to them rather than to their employers, on account of the moderate scale of compensation established. View it as we may, the whole question has been and is of national and international import. The time-honoured principles of the law of torts have been cast aside, a wider rule of responsibility has been framed, and no man can now say what will be the ultimate effects of the new doctrine.

THE GREAT JURISTS OF THE WORLD.

XIII.—LORD STOWELL.

[Contributed by NORMAN BENTWICH, ESQ.]

IN the annals of English law there is no other instance of two brothers attaining such a high place as did William Scott and John Scott, who came to be known as Lord Stowell and Lord Eldon. Their excellences were different: the elder was pre-eminent in counsel, the younger in advocacy; the one was supreme as jurist, the other as statesman. Either of them occupied a most distinguished position on the Bench, the one as head of the Chancery Courts, the other as judge of the Court where the Civil Law and Law of Nations was administered; and if Lord Eldon figured more prominently in the life of his own time, his brother left a greater name in the record of jurisprudence. Before his day England had not produced any supreme jurist who by his writings marked a new development of the Law of Nations, unless we place in that class Richard Zouche, who, however, was "more of a systematiser of doctrines than an innovator"; and it was fitting that the great contribution to International Law in a country which has always excelled in practice rather than in theory should be made by a practical and not by a theoretical exponent. Lord Stowell made the law of prize in administering it, as Mansfield and Holt had made the law merchant on the Bench. He did, in fact, for the law of commerce in war what they had done for it in peace—established its rules on a clear and broad basis. But while their work had validity only for the people of their country, much of his obtained the respect of the community of nations. The judgments that he gave were the "living voice" of the *jus gentium*.

William Scott and John Scott were the sons of a Newcastle shipper. William, who was six years the elder, was born in 1745, and by a lucky accident his mother had removed shortly before his birth to a house on the Durham side of the Tyne, in order to escape the turmoil caused by the invasion of the Young Pretender. The accident was lucky in that it enabled William Scott, when he had passed through the Grammar School at Newcastle, to be elected in 1761 to a Durham Scholarship at Corpus Christi College, Oxford. Three years later, profiting further by the lucky accident of his birthplace, he was elected to a Durham fellowship at University

College. Though he had entered as a student at the Middle Temple in 1762, and was already bent on a career at the Bar, his own caution and his father's wish led him to remain at Oxford as tutor of the college. He lectured in ancient history, and in his academic period he acquired a large knowledge of the Roman jurisprudence and of the whole classical culture, to which he owed the grasp of the Civil Law and the dignity and lucidity of expression which marked him as a judge. In 1774 he was appointed Camden Professor of Ancient History; and in that office he delivered courses of lectures, of which one of his biographers says that "the fame of them rendered his classic youth the rival of his judicial age." Gibbon's remark that he was "assured that were they given to the public they would form a most valuable treatise" is less eloquent but more convincing. Throughout his life Stowell retained a close association with literary pursuits and literary society; he was an intimate friend of Dr. Johnson, and was elected a member of the famous literary Club of which the doctor was dictator, and he lived to be its doyen. He did not write a book in the ordinary sense of the term, but the stamp of literature and liberal culture is upon his judgments. The turning-point of his life was the death in 1776 of his father, who left a fortune of not less than £20,000 and made his eldest son residuary legatee. Cautious as he was about risking a loss of income, his circumstances were now such that he could with an easy mind forgo some of his offices at the University, and turn to that career to which he had looked forward from his youth. He resumed his suspended studies at the Middle Temple, and in 1777 he writes: "I have got a room in the Temple, and keep Term with a view of being called to the Bar as soon as possible, which will be in about two years."

His brother John was already making his way at the Common Law Bar, but William elected to practise in the Ecclesiastical and Admiralty Courts, which were then combined in the precincts of Doctors' Commons. He took the degree of Doctor of Civil Law at Oxford—a necessary qualification—and was admitted into the faculty of advocates of those Courts, and at the same time called to the Bar in 1780, when he was thirty-five years of age.

While the Common Law prevailed almost exclusively in the Court of King's Bench, and in the Courts of Chancery an original system of English equity was being evolved, in the Ecclesiastical and Admiralty Courts, which had jurisdiction over testaments, marriages, and shipping, or as a wag put it, over "bad wills, bad wives, and bad wessels," the Civil Law continued to form the basis of jurisprudence. From the beginning of the sixteenth century the barristers practising before those Courts had formed themselves into a college, of which each member was a Doctor in the Civil Law. The register dates from 1511, and the college's first habitation was in a block of houses in Knight-riding Street which belonged to St. Paul's Church. After the fire of London in 1666 which destroyed their property, the doctors

were for a time lodged in Exeter House in the Strand—since put to different uses—but in 1672, by an Order-in-Council, they were authorised to retake possession of their old site, and they erected a new building which henceforth bore the name of Doctors' Commons. This college, which received a charter of incorporation, consisted of a number of fellows all of whom had to be doctors, practising in the Court of the Arches or the Archbishop's Court; and the judges of the tribunals before which they pleaded were regularly chosen from among the members. The number of advocates was narrowly limited and seldom exceeded twenty-five, so that once a man of ability was admitted, he was well-nigh certain to secure a large practice.

William Scott was peculiarly fitted for success in the branch of law to which he attached himself. He brought to it not only a splendid intellect, an unrivalled lucidity of expression, an intimate acquaintance with the Civil Law and a wide knowledge of the history of the ages in which it grew, but also some personal experience of shipping affairs. For a year after his father's death he carried on the shipping business preparatory to winding it up; and a privateering enterprise on which a younger brother embarked led him to direct his attention to the Law of Prize. The only quality he lacked was fluency in public speaking: at first he wrote out his speeches, but as the Ecclesiastical and Admiralty Courts knew no jury and relied more on written than on oral testimony, readiness of speech was less requisite than knowledge of law and clearness of argument. In those respects he was pre-eminent. A year of silence was imposed upon all the newly elected members of the college, during which they were expected to attend the Courts, but as soon as the enforced probation was over, Scott leapt to the front. His brother wrote of him in 1783: "His success has been wonderful, and he has been fortunate beyond example." In that year he obtained a sinecure, being appointed the Registrar of the Court of Faculties, and in 1788 he became at once judge of the Consistory Court of the Bishop of London, Vicar-General of the Archbishop of Canterbury, and Advocate-General—a position which had the same rank at Doctors' Commons as that of the Attorney-General at Westminster. The post was exceptionally lucrative at the time he held it, because of the war which broke out between England and France in 1793. Privateering, as Franklin said, was the passion of England; the spoils were large, and Scott gathered in large fees. It was his duty to appear for the Crown in all cases of disputed prize, and as between 1793 and 1815 the English Admiralty granted 10,000 letters of marque, the number of captures which were brought in for decision was immense. In 1798, having obtained a commanding position as advocate, he was appointed judge of the High Court of Admiralty, while a few months later his brother became Solicitor-General. He had entered the House of Commons in 1790 as member for the borough of Downton, after having been unseated on petition for the same borough six years earlier, and in 1801 he was elected as member for the University of Oxford. He kept his seat

till he was raised to the peerage as Lord Stowell in 1821. But he did not take a prominent part in the political sphere: he spoke but seldom in debate and, strangely enough, without distinction. His whole energy was given to, and his fame was entirely gained in, his judicial work, whereby "he stamped the image of his own mind upon the international jurisprudence of the world." As proof of his industry and of the volume of cases he was called upon to decide in that epoch of incessant war, it may be mentioned that in the year 1806 he gave 2,206 decrees and judgments. In addition to this, he was continually advising the Lords of the Admiralty, and was at the same time presiding over ecclesiastical causes. In 1821 he resigned his Consistory judgeship, but he retained his position as judge of the Admiralty Court till 1827. Then, at the age of eighty-three, but while his vigour was still unimpaired, he vacated that office. He gradually declined and died in 1836, leaving a vast property of nearly a quarter of a million in personalty and considerable real estate. Though a *bon vivant*, he had been saving to the point of meanness throughout his life, and he loved, as he put it, "the elegant simplicity of the three per cents." "Scott will take any *given* quantity of wine," was remarked of him by a clerical wit who noted that he drank more when dining out than when at home. But his little failings of personal character are blotted out by his immense services to English law, and indeed to the whole science of law, which raised the fame of our international jurisprudence to a height to which it had never risen before.

It was the good fortune of Stowell that all his chief judgments were well reported and have been preserved to illuminate posterity; or, rather, it was the happy fortune of Dr. Christopher Robinson that, on taking his seat in the Admiralty Court in 1798, he determined to add to the collection of reports in the other Courts of Justice a set recording the decisions in Admiralty, which had not hitherto been so served. At the same time it was happy for the judge that he was not fettered in his application of broad principles and the usage of nations by the findings of predecessors in his office. "With the exception of a few notes by Sir J. Simpson and some scattered memoranda . . . and occasional references to tradition, there was no precedent for the guidance of Scott," and, one may add, no obstacle in his path. In the field of Ecclesiastical Law he was not so unhampered: here the Canon Law, text-books, and precedents hedged him about; and his decisions, preserved in the reports of Haggard and Phillimore, do not possess the same permanent value and originality. Nevertheless there are several cases in which his judgment has marked an important step in the development of the law. His place among the world's jurists depends, of course, upon the other part of his work, which is preserved in the volumes of Drs. Christopher Robinson, Dodson, and Edwards. As the Napoleonic struggle brought forth a Pitt to direct our politics, a Nelson to carry our navy to triumph, and a Wellington to lead our army to victory, so too it brought

forth a Scott to erect our Prize Law upon a new and firm foundation, and to establish justice in our hegemony of the sea. The judge fitly realised the unique opportunity which lay before him, and he lavished an infinite care upon the preparation and edition of his judgments. By their clear adherence to the principles of justice, strict, perhaps, but seldom strained, as much as by their "inimitable felicity of language," they have commanded since the death of their author the assent not only of the English but also of the American Courts, and, more than that, many of the rules which he laid down in adjudicating upon the cases before him have passed into the law of nations. Coleridge in his *Table-Talk* recommended to all statesmen with the perusal of Grotius, Bynkershoek, Puffendorff, Wolf and Vattel the reports of Dr. Robinson; and the verdict of later generations has confirmed for Lord Stowell the place which the contemporary poet and philosopher assigned to him, as the finest exponent in practice of the law regulating the rights of belligerents and neutrals in war upon the high seas. Amid all the violence and unwarrantable pretensions of the time, advanced by his own country as well as by Napoleon, he held aloft the standard of fairness towards neutrals, enforcing the established law with exactitude and severity, but cutting at the roots of innovation; never countenancing sham evasions of the law, but never, on the other hand, countenancing oppressive fictions. In the stress of war his judgments were impugned by some American judges, but his vindication came upon maturer consideration: as one of them wrote to him later: "On a calm review of your decisions after a lapse of years, I am bound to confess my entire conviction both of their accuracy and equity."

The distinguishing characteristic of Lord Stowell's judgments is his unerring faculty for seizing on the true bearing of every problem presented to him, and his equally unerring powers of applying broad propositions of law to every combination of circumstances. Perhaps it is due to his early career that he brought to the Bench a philosophic grasp such as few English judges have exhibited. Certain it is that he scorned all chicanery and fiction, and that the distinctions which he drew between different cases of capture and prize are always based upon clear principles.

To deal, however, first with the minor part of his work which affected only English jurisprudence. Several of his decisions when sitting in the Episcopal Courts have become leading cases. What characterises them all is the thoroughness and symmetry of their form. First he lays down the broad principles to be applied in the class of case before him, with apt reference to the Civil or Canon Law applicable: then, with mastery of learning he deals with the text-writers or judicial precedents, and distinguishes or adopts their remarks: and finally he dissects with singular acumen and lucidity the facts and the evidence in the case before him and applies the law which he has already enunciated. Typical is his judgment in the case of *Dalrymple v. Dalrymple*, reported in Haggard (vol. ii. p. 54). In that case he was called upon to decide whether a marriage entered upon by civil contract without a

religious celebration according to the law of Scotland was valid, one of the parties being an English officer on service, quartered in Scotland. Of the objection raised on this score he makes short work :

"Being entertained in an English court, the case must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss G.'s marriage rights must be tried by reference to the law of the country where, if they emit at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." He passes on to an elaborate analysis of the general Roman and Canon Law of marriage, and then to a consideration of the marriage law of Scotland, in order to see in what instances it has "resiled" from the general law. He reviews first the opinions of all the authoritative Scottish jurists, and next the judicial decisions of the Scottish Courts, and finally enunciates the rule that by the law of Scotland "the *marriage contract de præsenti* does not require consummation in order to become very matrimony; that it does *ipso facto et ipso jure* constitute the relation of man and wife."

Similar in its general framework is the judgment in *Lindo v. Belisario* (1 Haggard 216), where he has to determine the validity not of a Scottish but of a Jewish marriage—a new point in the English Courts. Here, in the same thorough fashion, he examines and weighs the opinions of the various Rabbinic authorities upon the question whether a betrothal carried out with certain ceremonies ranks as a binding marriage contract, and in the end, feeling himself, as he says, to be on novel ground "on which doubts ought to be entertained and questions sifted with great caution," he frames a few particular questions which he addresses to the Jewish authorities; and upon the answers to these questions he later gives his judgment. "If," he remarks, "I were to determine the question of marriage on principles different from the established authorities amongst the Jews as now certified, I should be unhinging every institution, and taking upon myself the responsibility as Ecclesiastical Judge, in opposition to those who possess a more natural right to determine on questions of this kind."

The principle here laid down that domicile does not involve an unlimited subjection to the ordinary laws of the country, he affirms again in one of the last decisions he gave as judge of the Consistory Court—*Reading v. Smith*, 1821 (2 Haggard 371), when the question was as to the validity of a marriage celebrated in South-Africa between two British subjects which would have been void by the local law. He held that the marriage was good, because of the circumstances that the husband was an officer in the British forces occupying the country, the parties had been married by the English chaplain, and the marriage had stood for twenty-five years. He was free to apply equitable principles, because "while the English decisions have established the rule that a foreign marriage, valid according to the

law of the place where celebrated, is good everywhere else, they have not *e converso* established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally to be regarded as invalid in England."

Though willing to apply equitable justice wherever he felt it open to him, Sir William Scott never allowed himself to be moved from the strict administration of the established law by vague considerations of humanity. At the outset of his judgment in *Evans v. Evans* (1 Hagg. 35), where he defined the conditions of "legal cruelty" as a ground of divorce in a way which has never been excelled, he states his maxim concisely: "Humanity is the second virtue of the Courts, but undoubtedly the first is justice." It was the same outlook which led him to hold in the trial of *The Slave Grace*—which came to him on appeal from the Vice-Admiralty Court of Antigua—that the temporary residence in England of a negro slave without manumission suspends, but does not extinguish, the status of slavery of a person who after such residence voluntarily returns to a country where slavery is legal. The decision aroused great opposition at the time and is of only academic interest to-day; but though the last of Stowell's reported judgments, it is impregnated with the same mastery of principle and unswerving respect for the law as his Admiralty decisions in prize law. It is significant that in a letter to Mr. Justice Story he expressed his personal disgust at the continuance of slavery in the West Indies, and that the American jurist in reply declared his complete agreement with his reasoning in this judgment.

As he did not allow personal feeling to influence his judgment in times of peace, so in times of war he was not swayed by national antipathies in considerations of national interest. Foreign critics have indeed accused him of undue severity; but the complaint is rather that the law which he administered was oppressive upon neutrals than that he administered it with partiality or national bias in favour of captors. And in defence of his attitude towards neutrals, it should be pointed out that he was judge of the Admiralty Court when England was fighting for her national existence, and when Napoleon sought to make neutrals his instruments in the war against English commerce. The supreme justification of Stowell's decrees is that the United States, whose merchants had been hardest hit by them, came afterwards to recognise their equity and to follow them when they became belligerent.

To turn now to these decisions, it is unnecessary to summarise the Prize Law of England as it was established by Stowell. All one can do is to notice a few points which illustrate his general outlook, and some of the rules which he laid down. His judgment delivered during the first year of his office (1798), in the case of *The Maria* (1 C. Rob. 350), one of a fleet of Swedish merchantmen which was sailing under convoy of a ship of war, and in pursuance of the principles of the Armed Neutrality resisted visitation and search by a British cruiser, has become a classic of International Law. He

enunciates in two sentences the proper character of the Prize Court as a tribunal where the law of nations is administered. "The seat of judicial authority is locally here in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the judge sitting in an Admiralty Court not to deliver occasional and shifting opinions to serve present purposes and particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent States, some happening to be neutral and some belligerent." And upon the merits of the case before him he insists that the usages and practice of nations have recognised the right of the belligerent to protect himself through search of suspected ships against assistance being given to his enemy by neutrals, and he sweeps away the loose arguments urged in support of the rules of the Armed Neutrality that convoyed ships should be free from search. "Upon such unauthorised speculations it is not necessary for me to descant; the law and practice of nations (I include particularly the practice of Sweden when it happens to be belligerent) give them no sort of countenance, and until that law and practice are newly modelled in such a way as may surrender the honour and ancient rights of some nations to the present conveniences of other nations (which nations may perhaps remember to forget them when they happen to be themselves belligerent), no reverence is due to them: they are the elements of that system which, if it is consistent, has for its real purpose an entire abolition of capture in war, that is, in other words, to change the nature of hostility as it has ever existed among mankind, and to introduce a state of things not yet seen in the world—that of a military war and a commercial peace." The Declaration of London of 1908 proposes indeed the renunciation of the right of search of convoyed neutral vessels, so that the exact point decided in the case may be obsolete; but the principles which are laid down in this judgment as to the bindingness of international practice, till by the consent of nations it is changed, remain of abiding validity.

Lord Stowell conceived the position of a Prize Court in its full dignity and responsibility as an international Court, administering not the national judge's theories, but the acknowledged practice of nations, and he defined this conception most eloquently in a case where he had to determine whether a belligerent could set up a Prize Court in neutral territory (*The Flad Oyen*, 1 C. Rob. 135). A French privateer had carried an English prize vessel into Bergen, and there procured its condemnation by the French Consul. In repudiating the condemnation he declares: "It is my duty not to admit that because one nation has thought proper to depart from the common usage of the world and to treat the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution, merely because general theory might give it a degree of countenance independent of all practice

from the earliest history of mankind. The institution must conform to the text-law and likewise to the constant usage upon the matter." He neither introduced new doctrines himself, nor could he respect their introduction by foreign powers. His function, as he understood it, was where a clear practice did not exist, to define exactly, by application to particular and varying cases, the general principles that were to be found in the works of the great publicists; where it did exist, to follow it and if necessary amplify its scope.

Among the doctrines hitherto attended with doubt, which Lord Stowell placed upon a certain foundation, was the illegality of trading with the enemy during war. In the case of *The Hoop* (1799, 1 C. Rob. 196) he reviewed the large number of cases decided by the English Lords of Appeal during the eighteenth century, and, bringing to their support the statements of Bynkershoek, he enunciated the clear principle that "all trading with the public enemy unless with the permission of the Sovereign is interdicted." The disability of an alien enemy to sue in the Courts is the reason for the prohibition; since "a state in which contracts cannot be enforced cannot be a state of legal commerce." The excellence of this, as of so many of Stowell's judgments, is not that it introduces a new rule, but that it elucidates the existing doctrine and confirms it with reason. His statement of the rule is "What oft was held, but ne'er so well expressed."

The doctrine of "trade domicil in war" is another to which he gave definiteness and stability. In his day the requirements of domicil for the purposes of the personal law had not been thoroughly investigated; but sitting as a Prize Court judge he was concerned with a different kind of domicil—viz. the quality of residence in, or association with, a foreign country which was necessary to clothe a man with enemy or neutral character.

The object of the prohibition of trade with the enemy and the confiscation of enemy ships and cargoes being to prevent the increase of wealth which Commerce brings, the belligerent attached enemy character to a merchant not according to his nationality but according to his place of residence or his place of business. If a British or an enemy subject, either before or during the war, removed to a neutral country and *bonâ fide* took up his residence there, then his innocent trading did not offend against the belligerent; if, on the other hand, a neutral subject took up his residence or established a business house in England or in an enemy country, his ship or his cargo received the national character of its origin. Under the influence indeed of the ideas of the French Revolution which emphasised the principle of nationality, the French Prize Courts adopted another criterion of enemy character, and made it depend upon the political allegiance of the subject. Thus it was held in the case of *Le Hardy*, 1802, that a neutral merchant domiciled in a belligerent country did not acquire a belligerent character, and his property at sea was neutral property.

The new doctrine, however, found no favour with Stowell. Every person

domiciled in an enemy state, whether a born subject of that state or not, he regarded as an enemy, and he condemned his ship or cargo if captured (cf. *The Indian Chief*, 1801, 3 C. Rob. 12). Conversely, every person domiciled in a neutral country, whether a British or a neutral or an enemy subject, he regarded for purposes of maritime capture as a neutral (cf. *The Danous*, 1802, 4 C. Rob. 255). This was the general rule, but with his strict application of the law in favour of captors Stowell further laid down in *The Jonge Klassine* (1804, 5 C. Rob. 302) that a merchant may have mercantile concerns in two countries, and if he acts as a merchant of both must be liable to be considered as a subject of both. Hence the cargo derived from the business house of a neutral owner in the enemy country might be condemned. On the other hand, he pointed out in *The Herman* (1802, 4 C. Rob. 228) that "when a person has a house of trade in the neutral country, and one in Great Britain secondary to his house in the neutral country, that he may carry on trade with the enemy from his first house cannot be denied, provided it does not originate from his house in London, nor vest an interest in that house." And while the intention of permanent residence in a country was necessary in his day to fix domicile for civil purposes, he held, as the nature of the case required, that a trade domicile for the purpose of establishing enemy or neutral character might be more easily acquired. Any residence or establishment in the country for commercial purposes such as made a person's trade or business contribute to and form part of the resources of such country was sufficient, whether or not there was an intention to make the country a permanent home. The trade domicile, again, might be lost as easily as it was gained. Stowell formulated the two main rules which still govern the subject of commercial domicile in the cases of *The Harmony* (1800, 2 C. Rob. 322) and *The Indian Chief* (1801, 3 C. Rob. 12). In the former he pointed out that "time is the grand ingredient in constituting domicile . . . be the occupation what it may, it cannot happen but with few exceptions that a mere length of time shall not constitute a domicile," while in the latter he declared: "The character that is gained by residence ceases by residence; it is an adventitious character which no longer adheres to him (the merchant) from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*."

Some modern writers have denied that there should be any difference between trade domicile in time of war and personal domicile in time of peace, but the distinction is reasonably based on the different purpose and consequences of the two statutes, and it has been regarded by both English and American Courts for a century; and Stowell's standard of domicile for prize purposes has been throughout adopted.

It would be tedious to mention the decisions in which Lord Stowell defined the English rule as regards contraband, absolute and conditional, and the penalty for its carriage, the conditions of a blockade by notice and

de facto, and the varying penalties for its breach, unneutral service by carriage of despatches or military officers of the enemy, and the legal consequences attaching to it, the effect of recapture of a prize, and of the transfer of a cargo *in transitu* by a belligerent to a neutral owner, and the engagement by a neutral in the colonial and coasting trade of the enemy. Suffice it to say that he settled our Prize Law upon all these points, and, though circumstances have changed, and international agreements have largely cut down the rights of maritime capture, his judgments still remain the surest guide upon Prize Law, and mark out with scarcely an exception the proper limit of interference with neutral trade.

On one point, indeed, modern practice has countenanced an extension of a rule which he formulated, beyond the point to which he applied it. In order to evade the prohibition against carrying merchandise from the French and Dutch Colonies during the Napoleonic wars, the shippers of the United States were in the habit of consigning the goods in the first place to some neutral port in the United States or elsewhere, and then transshipping them on another vessel which brought them to Europe as colourable American merchandise. Lord Stowell, however, crushed this evasion in condemning *The Maria*, No. 3 (5 C. Rob. 365), and *The William*, No. 2 (*ibid.* p. 585). The Court, he insisted, did not regard the fiction but the fact, and if the cargo were in fact destined for the enemy's country, or in fact derived from the enemy's colony, then it was confiscated whether it was nominally consigned to, or had been nominally transhipped from, a neutral port. "The truth may not always be discernible, but when it is discovered, it is according to the truth and not according to the fiction that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended."

But in the case of ordinary contraband trading he did not apply the so-called doctrine of continuous voyage. A ship, he said, could only be condemned out of her own mouth, and the articles to be confiscable must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port (*The Imine*, 3 C. Rob. 167). Though there might be the strongest reason to suspect the ultimate hostile destination of her cargo, yet, if her own port of delivery were neutral, the cargo was immune. The growth of railways and the desire of belligerents to compensate themselves for the loss of offensive rights which the Declaration of Paris has entailed, by pressing those that remain, have led to the application of the rule of continuous voyage to any cargo of contraband goods which is ultimately destined for the enemy's forces. Long disputed, the usage has received the sanction of the Declaration of London as regards goods which are absolute contraband, though not as regards those which are only conditional contraband. To another innovation of latter-day belligerents which has not yet received, and

it may be hoped will never receive, international sanction, Lord Stowell lent no countenance, viz. the destruction of neutral prizes before proper condemnation in a Prize Court, without making compensation to the neutral owner, if in the end the guilt of the vessel were not proved. His opinions upon the proper treatment of prizes by the captor are set out in his last recorded prize judgment, *The Felicity* (1819, 2 Dodson 381).

In all cases of capture, he says, it is the captor's first duty to bring in the prize to port for adjudication. "If impossible to bring in, the next duty is to destroy enemy's property. Where doubtful whether enemy's property and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss. When it is neutral, the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified under any such circumstances by a full restitution in value. These are rules so clear in principle and established in practice, that they require neither reasoning nor precedent to illustrate or support them."

It has been said of sermons that, while dealing with eternal subjects, they tend to be the most ephemeral literature; and so it might be said of prize judgments, that though concerned with International Law they tend to be the most national expressions of judicial opinion. But at the beginning of the nineteenth century Stowell in England, and to a smaller degree Marshall in the United States, bringing to their national Prize Courts two of the greatest intellects of the time, realised the ideal character of the jurisdiction entrusted to them, and established an Anglo-Saxon law of prize which may truly be described as "a light to the nations." It is one of the surest testimonies of the stability of Stowell's work that the Declaration of London, which was recently drawn up by representatives of the great Powers to serve as a code of maritime law in war, embodies many of the rules which he formulated when sitting as judge of the British Prize Court. And the International Convention for the establishment of an International Prize Court, which was promoted by the British Government and signed by the delegates of all the Powers at The Hague Peace Conference, 1907, gives reality at last to that ideal of the Prize Court which he upheld, as a tribunal administering the law of nations, by providing for the constitution of an appeal court in matters of prize, which shall be as well in fact as in theory, and both in its membership and the law it applies, international.

NATIONALITY AND NATURALISATION IN LATIN AMERICA FROM THE POINT OF VIEW OF INTERNATIONAL LAW.

[Contributed by HARMODIO ARIAS, ESQ., B.A., LL.B. (*Cantab.*).]

I.—INTRODUCTORY.

International Rights and Duties Springing from Nationality.—The Law of Nations being a law dealing with the relations of States, it follows that individuals as such are not subjects of this law. In practice, however, it is generally on account of the actions of private individuals, either directly or indirectly, that the rules of International Law are put into play—that is to say, that a State issues or receives a complaint because an international injunction has been disregarded by one of its members. This being so, it is eminently important to know how it is that the individual comes to be connected with an international entity so as to cause rights and liabilities to spring up, which the Law of Nations will enforce or sanction. For it is evident that when a wrong has been committed not all the international community has a right to exact the corresponding reparation, but only the particular State or States which are deemed to have been injured. How are we to know, then, what particular State is entitled to claim compensation for the damages, injuries, or maltreatment suffered by an individual on account of the actions of another State or of persons for whom the latter is responsible? The answer to this question is supplied by the law of nationality.

The rights to which a State is entitled in virtue of the doctrine of nationality become apparent when a person leaves the country of which he is reputed to be a member and settles in a foreign country. For every State has the right to protect its citizens abroad—a right which most States exercise vigorously, keeping their diplomatic agents on the alert, jealously regarding any action which may be injurious to their citizens or subjects.

Nor is it of less importance for a State to be able to claim the aid of its members when the occasion arises. For the local law may impose particular liabilities on those persons who are citizens or subjects, many of these duties being incumbent on the members of the State even when they reside in foreign lands. The home Government is even entitled to

demand of such persons to leave the foreign country in which they reside and come home to lend the services which the law imposes upon them.¹ And a State is considered to have no power to detain a foreign subject when the latter has received orders from his country to that effect, except when right to the contrary is granted by the laws of belligerency.

In dealing with the rights granted by International Law in connection with the law of nationality, the extradition of criminals may also be mentioned, since by the majority of extradition treaties a State has the right to refuse to extradite one of its own subjects.

In the same way it is held that there are just causes for the expulsion of foreigners, and also that there is a right to refuse to admit those who are not members of the community.

On the other hand, one of the most conspicuous duties with which a State is saddled in virtue of the law of nationality is that of receiving on its territory such of its members as are not allowed to enter in or remain on the territory of other States. It is possible, at least theoretically, that certain persons may be expelled or refused admittance by all foreign countries. The States to which such persons belong cannot refuse to receive them.

Lack of Universal Rules in International Law for Determining who are and who are not Subjects.—We have seen that there are rights granted to, and duties imposed on, States on account of their personal element; and that these rights and duties are, therefore, the creation of the Law of Nations. *Prima facie* one would be inclined to expect that the ideal International Law should also determine who are the persons to be considered as members of a given State—that is to say, that it should lay down rules for the guidance of every State when its municipal law is attempting to discriminate between nationals and foreigners.² Unfortunately the imperfection of the Law of Nations is such that this is not the only chapter where provisions for the dealings of States is wanted. And it cannot be thought by any one who has considered the rights and liabilities of States springing from the notion of nationality that the want of provisions, so far as they relate to this subject, are devoid of importance. But the inconvenience consequent upon this lack of universal principles will become perfectly obvious when an attempt is made to inquire into the rules that obtain in different countries. It will then be possible to appreciate how difficult and complex are most of the questions arising out of nationality and naturalisation. Considerable friction in the friendly relations of States

¹ The so-called *jus avocandi*.

² It is probable that Professor Oppenheim had in mind the *actual* state of International Law in this connection when he said that "it is not for International but for Municipal Law to determine who is and who is not to be considered a subject" (*International Law*, vol. i. p. 348). Should he mean, however, that even from an ideal point of view the province of International Law should not extend to affording guidance to States in determining which persons ought to be considered as subjects or citizens of a given State, we would not be inclined to agree with him.

would be avoided if it were possible to adopt rules applicable to every member of the international community.

International jurists frame rules by inquiring into the treaties and practices of nations. When no rules can be laid down in a particular subject they content themselves sometimes with advocating a particular principle, hoping that the custom of States would tend in that direction, and thus an international consensus would be arrived at. No other course is possible owing to the fundamental principle that the members of the family of nations are sovereign States, and therefore there is no person or body who can enact laws for governing the relations of State to State. International Law is yet in course of development.

In connection with nationality and naturalisation States are left free to determine what persons are to be considered subjects and what persons are foreigners. It may be stated in advance that there is no place in International Law where more conflicting rules would obtain. For in the absence of definite international injunctions States generally follow that rule which most favours their interests. And a plurality of adverse interests will necessarily produce conflicting conduct. It is not intended to suggest that States, whenever possible, disregard the general good. International persons, just like ordinary individuals, would adopt that line of action which apparently entails greater benefits to themselves, overlooking, so far as the circumstances would allow, the contingent harm that may result to others, provided that the hardship thus ensuing is not a considerable one. The tendency to act in this manner seems to be inherent in the actual state of society, notwithstanding that an intention to produce such results is expressly disclaimed.

International Law enjoins that States should frame their conduct in accordance with its rules, but it cannot enforce inaction when no rules exist. The political action of States then comes into play. Professor Westlake speaks of certain classes of cases in which such action on the part of States is justifiable. "One is that in which no rule meeting the circumstances has been sanctioned by the consent of the international society. We do not mean only that there is no recognised rule for guiding action in the circumstances, but also that there is no general opinion condemning action in them; for such an opinion, if it existed, would be equivalent to a rule in favour of the state of things which must continue if action is not taken."¹

It is hardly necessary to point out that the notion of nationality is one of the cases that the eminent writer had in mind when he laid down the rule contained in the foregoing passage. In saying so we do not mean to suggest that a State is at liberty to issue any rules it likes on this subject, for undoubtedly cases may arise, and in fact exist, which the Law of Nations condemns. The discussion of these would be better in connection with

¹ *International Law*, vol. i. p. 288.

the particular rules with which we shall have to deal in the following pages. Nevertheless it is perfectly clear that the municipal law of States has a wide scope in determining the principles that should govern both nationality and naturalisation.

II.—NATIONALITY OF ORIGIN.

When a person is considered as a member of a given community his nationality may be of origin, or acquired.¹

The usual manner of dealing with nationality of origin has been to consider the three groups and systems into which nations are supposed to divide. But it is in fact impossible to arrive at the formation of a perfectly logical classification owing to the variety of the provisions and exceptions of the different States. Nevertheless we shall deal summarily with the three systems for the sole purpose of giving a vague idea of the main path followed by the members of the international family.

1st Group.—Children follow the nationality of their parents whatever may be their place of birth (*jus sanguinis*). This system is to be found, *e.g.*, in Austria, Costa Rica, Germany, Hungary, Mexico, Salvador, Switzerland, etc. But the rule is not absolute; for sometimes it is found in the legislation of those countries which most nearly follow this practice that they claim as nationals the children born or found in the country whose parents or nationality are unknown.² Sometimes the children of foreigners are deemed to be nationals if they have not, one year after attaining majority, declared before the competent authority that they choose to follow the nationality of their parents,³ or if on becoming of age they inscribe themselves in the proper register.⁴

2nd Group.—Nationality is determined by the place of birth, whatever may be the parentage of the person in question (*jus soli*). This system is adopted by the following countries of the New World: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. It must be pointed out, however, that although this principle is adopted in its generality by those countries, yet

¹ It must be said here that we are greatly indebted to the masterly study of M. Lehr, *De la Nationalité et des diverses manières dont elle s'acquiert dans les principaux Etats du globe*, as supplying us with a guide to the original text of the diverse laws and constitutions which we have directly consulted. We owe also information in this respect to the kindness of some diplomatic and consular agents. It is hardly necessary to say that such works as Cogordan, *La Nationalité*, and the general treatises on International Law by Bonfils, Hall, Oppenheim, Westlake, etc., have proved of great value to us.

² Costa Rica, Law of December 21, 1886, Art. 1; Mexico, Law of May 28, 1886, Art. 1.

³ San Salvador, Law of September 29, 1886, Art. 2; Mexico, Law of May 28, 1886, Art. 2 (2).

⁴ Cuba, Constitution of February 21, 1901, Art. 5 (2). Cuba claims also as her nationals those persons born in foreign countries of native-born parents who have forfeited the Cuban nationality, provided that on attaining majority they inscribe their names in the proper register. Constitution, Art. 5 (3).

they sometimes follow both the *jus soli* and the *jus sanguinis*, as will subsequently appear.¹

3rd Group.—There are some countries that follow a mixed rule, paying attention both to the nationality of the parents and to the place of birth.

Jus Sanguinis in Latin America.—It has been pointed out that only Costa Rica, Cuba, Mexico, and San Salvador can be said to follow in Latin America the principle of the *jus sanguinis*. There are other countries, however, which adopt the *jus sanguinis* to the extent of giving their nationality to the children of their citizens, even when born abroad, provided that they come to establish their domicile in the country of their parents. Provisions to this effect are to be found in Bolivia,² Brazil,³ Chile,⁴ Colombia,⁵ Ecuador,⁶ Guatemala,⁷ Panama,⁸ Paraguay,⁹ Uruguay,¹⁰ and Venezuela.¹¹

Although Argentina¹² and Nicaragua¹³ have adopted also the principle of the *jus soli*, yet the children of their citizens born abroad take the nationality of their parents if they choose, there being no provision as to their domicile.

In Honduras it has been enacted that the nationality of children of Hondurans born in foreign territory is to be determined by treaty; it seems, therefore, that when there is no conventional provision the nationality of such persons, even when domiciled in Honduras, is that of their place of birth, for this Republic follows closely the *jus soli*.¹⁴

The law of Peru with regard to the children of a Peruvian father or mother born in foreign parts is to the effect that they are Peruvians by birth, if their names shall have been inscribed in the Civic Register during minority by the will of their parents, or by their own wish upon attaining majority, or being emancipated.¹⁵

Jus Soli in Latin America.—We have seen that there are at least fourteen countries in Latin America which claim as nationals all persons born within their territory, and, under certain conditions, also the children of their citizens

¹ For the special reasons that have led the majority of the Republics of Latin America to follow this practice, see pp. 130 and 132.

² Constitution of Bolivia, 1880, Art. 32.

³ Constitution of Brazil, Art. 69.

⁴ Constitution of Chile, Art. 6 (2).

⁵ Constitution of Colombia, 1886, Art. 8.

⁶ In Ecuador the law is that children of Ecuadorian father or mother, born abroad, are Ecuadorian if they establish their domicile in the Republic and express their wish to be considered as such. Constitution of 1897, Art. 6 (3).

⁷ In Guatemala children of Guatemalans, born abroad, are considered as natives even without the condition of establishing their domicile in Guatemala, when conformably with the laws of the country of their birth, they shall be entitled to choose their nationality and they choose for Guatemala. Constitution, Art. 5 (2).

⁸ In Panama there is the further proviso that such persons should express their desire to become citizens of Panama. Constitution, 1904, Art. 6 (2).

⁹ Constitution of Paraguay, 1870, Art. 35 (2).

¹⁰ Constitution of Uruguay, Art. 8.

¹¹ In Venezuela they must, in addition, declare before the *Registrador Principal* their desire to be deemed Venezuelan citizens.

¹² Law of October 1, 1869.

¹³ Constitution of Nicaragua, 1893, Art. 7 (2).

¹⁴ Constitution of Honduras, 1904, Art. 7 (1).

¹⁵ Peruvian Constitution, Art. 34 (2).

even when born abroad. But some of these States require that certain conditions should be fulfilled in order to impose their nationality on the children of foreign parentage when born in the country. That is to say, although the *jus soli* is consecrated by those Republics which have been enumerated above, yet there are a few of these States which do not seem anxious to have the allegiance of certain persons, at least from a theoretical point of view, while in fact no advantage whatever would be derived from clothing them with the legal apparatus of nationality.

These disadvantages and inconveniences seem to have been perceived by the legislatures of Colombia, Ecuador, and Honduras, in so far as they relate to the nationality of children of foreign parentage born within the national territory. In these countries there are provisions to the effect that such persons are Colombians, Ecuadorians, or Hondurans (as the case may be) if they reside in the country of their birth. Enactments of this kind cannot fail to avoid vexatious conflicts, for it would be difficult, if not impossible, to assert the national jurisdiction when the person whose nationality is in question has fixed his domicile in the country of his parents.¹

The Latin American countries have never attempted to impose their nationality on the children of foreigners who reside in their territories as diplomatic agents. In the same way, by virtue of the doctrine of extraterritoriality they claim as citizens the children of their own officials even though they may not establish their domicile in the country of their parents. There are provisions in force which confer the rights and liabilities of nationality on the issue of persons who reside abroad in the *service* of their country, and these persons are to be deemed nationals, without the general requisite as to their domicile, even in cases when the local law requires that birth shall have taken place in the national territory.²

In those countries where the *jus soli* is the guiding principle in determining nationality it is to be expected that all public vessels, without any kind of distinction, should be held to be part of the national territory. Guatemala,³ Honduras,⁴ Mexico,⁵ and San Salvador⁶ have expressly incorporated in their legislation provisions to this effect. Public vessels are undoubtedly outside the jurisdiction of the local authorities when they happen to be in a foreign port, and therefore no abuse is committed by treating them as national territory for the purpose of determining the nationality of those persons born on board. On the other hand merchantmen, when lying in foreign ports, are subject to the local law. It would seem unreasonable to consider them as part of the national territory when in a foreign port for the purpose of

¹ Cp. Constitution of Colombia, 1886, Art. 8; Constitution of Ecuador, 1897, Art. 6(2); Constitution of Honduras, 1904, Art. 7 (1).

² Bolivian Constitution, 1880, Art. 31 (2); Brazil, Constitution, Art. 69, and Law of Nov. 12, 1902, Art. 1; Chilean Constitution, Art. 6 (2); Mexico, Law of May 28, 1886, Art. 5, etc.

³ Law of February 21, 1894, Art. 2.

⁴ Law of April 10, 1895, Art. 2.

⁵ Law of May 28, 1886, Art. 3.

⁶ Law of September 29, 1886, Art. 3.

deciding upon the nationality of a person who is born there. There do not appear to have been any cases decided on this question. The problem would be greatly complicated owing to the fact of conflicting principles of nationality and of territorial jurisdiction. As to the latter, however, it must be remembered that most countries of Continental Europe and the New World generally do not apply the local law to foreign merchantmen found in their waters—an exception which must be ascribed to comity when it has not been expressly provided for by treaties. But the question remains as to whether this relation of what is at most an imperfect right can be extended, so as to give to the vessel the character of national territory for the purpose of determining the nationality of those born on board.

So far we have confined our remarks to the case of nationality of origin. In the course of this short inquiry we have seen that a large majority of the Latin American States adopt the *jus soli*, while at the same time they follow the *jus sanguinis* to the extent of claiming the children of native parents born abroad when they fix their domicile in their parents' country.

It would only be natural to expect that these countries would allow a similar rule to apply in case of the children of foreigners born in the national territory—that is to say, they will not claim such persons as their citizens when they have fixed their residence in their father's land. Peaceful intercourse between nations is inconceivable when no reciprocity is permitted. No nations are so ready to claim the legal equality of the members of the international family as the Latin American Republics; hence it is to be hoped that although express legislation confining this principle to the extent to which we have pointed out is scarce,¹ yet no difficulties would be placed in the way of those who, born of foreign parentage, have gone to the country of their parents and wish to retain or be invested with the latter's nationality. We have not been able to discover any cases that have formed the subject of diplomatic discussion, but in view of the considerations which we have ventured to submit, it would seem that the Latin American States would be expected to allow a relaxation of the strict principle of the *jus soli* in this connection.

Illegitimate Children.—In dealing with the case of illegitimate children it should be borne in mind that such persons, according to a rule universally accepted, take the nationality of the mother's country if they are born there, and not that of the father, for in law he is necessarily uncertain. The complexity arises when they are born in a country different from that of their mother. In Latin America Costa Rica² and Mexico³ claim such persons as their citizens absolutely, while Bolivia,⁴ Brazil,⁵ Colombia,⁶

¹ See p. 131, *ante*.

² Law of December 21, 1886, Art. 1 (2). Costa Rica claims also the illegitimate child of a foreign mother acknowledged by a Costa Rica father.

³ Law of May 28, 1886, Art. 1 (4).

⁴ Constitution of 1891, Art. 69 (2).

⁵ Constitution of 1880, Art. 32 (1).

⁶ Constitution of 1886, Art. 8 (2).

Ecuador,¹ Guatemala,² Nicaragua,³ Paraguay,⁴ and Uruguay⁵ make them their citizens conditionally on taking up their residence or becoming domiciled in the country.

III.—ACQUIRED NATIONALITY.

Quite apart from birth a person may be invested with the rights and liabilities of nationality by certain acts performed by himself or herself. The sphere within which such acts lie is not without restriction, although it may seem, *prima facie*, from what we have said before, that a State is at liberty, generally speaking, to issue the necessary rules regulating nationality, since International Law does not as yet afford complete guidance on the subject. For the fact is that however vague and indefinite the limitation to the political actions of States might be, yet there is always some kind of sanction that prevents, or at least condemns, reckless and injurious conduct. For a State cannot regard with benevolent eyes, especially in connection with nationality, the action of another State which is calculated, or has a tendency, to deprive the former of a certain number of citizens or subjects, for these constitute what may be called the *personal* element of statehood. The acts of which we are now speaking are those to which the local law attaches the special importance of vesting those persons who perform them with the national character.

(i) **Marriage.**—Marriage is generally held to invest the wife with the nationality of the husband. The rule is undoubtedly the derivation of ancient institutions which regarded the wife as a simple appendage of her husband. In the progressive course of the advancement of Roman Law, although *manus* ultimately disappeared, yet there existed restrictions attendant on the position of a wife; and she was considered, generally speaking, as devoid of legal personality apart from her husband. Modern systems of law do not deprive of personality the woman who contracts marriage, but her *locus standi* in the sphere of law is not one of absolute independence. It would seem that the rule which invests the wife with the nationality of her husband is perfectly reasonable even at the present time, for in the actual state of society the husband is, from the point of view of private and public law, looked upon as the responsible, and therefore as the preponderant, element in the family. Such state of things would predominate as long as society rests on the basis on which it does at present.

Some countries of Latin America have expressly provided that a foreign woman who marries a native citizen takes the nationality of her husband; and should such a woman become a widow, she would retain that

¹ Constitution of 1897, Art. 6 (3).

² Constitution of 1879, Art. 5 (2).

³ Constitution of 1893, Art. 7 (2).

⁴ Constitution of 1870, Art. 35 (2).

⁵ Constitution of 1829, Art 8.

nationality during widowhood. Thus Brazil,¹ Costa Rica,² Cuba, Ecuador,³ Guatemala,⁴ Honduras,⁵ Mexico,⁶ San Salvador,⁷ and Venezuela⁸ have included in their laws dealing with the subject provisions to this effect. In the remaining Latin American countries we have been unable to find rules on this question, but there is hardly any reason for thinking that the wife of a native citizen would be considered to be invested with any other nationality different from that of her husband.⁹

(ii) **The So-called Imposition of Nationality in Latin America.**—In view of the statements sometimes made by certain writers in connection with the manner in which some of the South American States “impose” their nationality on foreigners, it would seem imperative to add a few remarks on the subject of marriage as investing a person with the rights and liabilities of nationality. It is asserted by Hall that in Bolivia and in Uruguay every foreigner who marries a native woman becomes *ipso facto* naturalised.¹⁰ Such a remark cannot but be considered as highly authoritative when it is remembered that it is derived from the pen of a very cautious and eminent writer. It must be objected, however, that Hall gives no authority for his statement with regard to Bolivia; and that after a careful search in the legislation of this country we have been unable to find any provisions to this effect. In fact, so far as we know, there does not exist any special law dealing with nationality or naturalisation; the only provisions on the subject that are now in force are contained in the Constitution of October 28, 1880. In view of these facts we venture to doubt the accuracy of the statement.¹¹

Art. 8 of the Constitution of the Oriental Republic of Uruguay, 1830, declares to be legal citizens all “foreigners, although without children, or with foreign children, but married to women of the country, who, professing any science, art, or industry, or possessing any capital employed in business, or real property, are residing in the State *at the moment when this Constitution*

¹ Law No. 1096 of September 10, 1860, Art. 2.

² Law of December 21, 1886, Art. 3 (3).

³ In this country, the foreign woman who marries an Ecuadorian takes the nationality of the husband if she establishes her domicile there. Law of August 25, 1892, Art. 20.

⁴ Law of February 21, 1894, Art. 17.

⁵ Law of April 10, 1895, Art. 1 (3).

⁶ Law of May 28, 1886, Art. 1 (6).

⁷ Law of September 29, 1886, Art. 3.

⁸ Constitution of Venezuela, 1904, Art. 9.

⁹ In the United States the law in this connection is not quite clear. It seems that a native woman there who marries a foreigner remains a subject of her State; but an alien woman who marries a United States citizen becomes herself naturalised. This was the law of England until 1870. See Hall, *Foreign Jurisdiction of the British Crown*, p. 41.

¹⁰ *Foreign Jurisdiction of the British Crown*, p. 47.

¹¹ We have also consulted on this particular point Don Pedro Suarez, Bolivian *Chargé d'affaires* in London, who had the kindness to furnish us with the necessary information with regard to his country. He not only seemed to be surprised at the assertion of Hall in this connection, but gave it as his opinion that a native woman marrying a foreigner would lose thereby her own nationality and become invested with that of her husband.

is sworn."¹ This is the authority for Hall's statement with regard to Uruguay. *Prima facie* he would seem to be justified; but it is to be regretted that he did not inquire sufficiently into the subject. Had he done so he would have been led to put the matter differently, and thus accuracy would have been attained. Taken by itself the language of Art. 8 of the Constitution would seem to be imperative—that is to say, that nationality is actually imposed on those persons having the requisite qualification, without leaving them any option for declining it. It would appear, however, that this article is not imperative, but merely facultative. This is the view taken by the Legislature which passed the law of July 13, 1874, regulating the application of Art. 8 of the Constitution. It is thereby enacted that foreigners to whom this article refers "and who desire to take up their citizenship" shall prove before a *Juez Petrado* that they possess the requirements of Art. 8 of the Constitution, and also that they should apply to be registered as citizens. A person, therefore, who possesses the qualifications prescribed by the Constitution is still regarded as a foreigner if he has not taken the necessary steps for becoming a legal citizen.² It must be pointed out, moreover, that even if the article in question were imperative, the provision would hardly apply at the present time, for it refers to those foreigners who "are residing in the State at the moment when the Constitution is sworn." As the adoption of the Constitution took place on June 26, 1830, of such individuals there can be but few left, if any.

Having now made the necessary reservations in order to place the two last-mentioned countries under the plane of fairness in connection with the so-called "imposition of nationality," we may proceed to deal with other enactments on the subject, so that we may appreciate the extent to which it is insisted in Latin America that foreign residents should be invested with the national character.

In Venezuela there is a tacit naturalisation for those foreigners who own real property or who have settled there without being able to prove their foreign nationality.³

"Foreigners who possess real property in Brazil and who have married Brazilian women, or have Brazilian children, so long as they reside in Brazil, unless they announce their intention of not changing their nationality,"⁴ are Brazilian citizens. It is likewise enacted by the Constitution of this country⁵

¹ The italics are the author's.

² An admirable account of the law on this point is found in the report transmitted to the Earl of Rosebery by Mr. Satow, Parl. Papers, Miscellaneous, No. 3 (1893).

³ Cited by Lehr, *Revue de Droit International et de Législation comparée*, 2^{me} série, tome x. p. 417. He extends this statement to Uruguay also. With regard to this country, however, we are compelled to make the same objections that we have submitted in connection with Hall's remarks as to the effect of marriage there. Our argument applies *mutatis mutandis* here.

⁴ Constitution of Brazil, 1891, Art. 69 (5).

⁵ *Ibid.* Art. 69 (4).

that foreigners who, having been in Brazil on November 15, 1889, did not, up to August 24, 1891, declare their intention of retaining their nationality of origin are deemed to be Brazilian citizens.

In Mexico all foreigners who acquire real property within the Republic, or who may have children born to them there, or who may serve the Mexican Government in an official capacity or accept from the said Government any title or public appointment, may elect for the Mexican citizenship.¹

The acceptance of certain public functions by a foreigner in Guatemala² and San Salvador³ *ipso facto* naturalises him. But he must possess in addition the other conditions which the law requires. Similar enactments are to be found in force in Germany and Norway.⁴

It is generally admitted that a country is entitled by the Law of Nations to refuse to admit foreigners into its territories. This being so, it follows *à fortiori* that a State has the right to prescribe the conditions under which foreigners may be allowed to settle under its dominions. International Law does not recognise the so-called right of intercourse. But in this question, just as in many others, theory and fact do not go hand in hand; the citizens or subjects of all nations are allowed to travel and settle freely in the country of their choice, provided they live in harmony with the laws of that place in which they happen to be. Accordingly it would seem unfair to attempt to state from a purely legal point of view the extent to which a State would be allowed to go in laying down the conditions under which foreigners are permitted to take up their residence in its territories. Dictates of humanity and equity, the need of intercourse with the other members of the international family, and the fear of retaliation would be powerful elements in determining the policy of a State. It seems to us sufficient, therefore, to say that it is unreasonable to insist that a foreigner should abandon his allegiance and take up the nationality of the place where he lives by the mere fact that he has acquired a domicile there, or that he is the owner of real property, or that he is married to a native woman. It is a recognised principle of law that if a thing is granted, the accessories necessary for its enjoyment must also be transferred. The acts which we have enumerated may fairly be regarded as real necessities for those who establish their residence in foreign parts.

It seems not less blamable for a State to issue provisions prescribing that the acquisition of landed property, or of a domicile, or the contracting of marriage with a native woman will naturalise a foreigner unless he announces his intention of not changing his nationality within a fixed period.⁵ It is true that he is given the option of retaining his original nationality, but the fact that he is required to express his intention to that effect may in

¹ Law of May 26, 1886, Art. 1, clauses 10, 11, and 12.

² Constitution of Guatemala, Art. 10. ³ Constitution of San Salvador, Art. 45.

⁴ Cited by Lehr, *loc. cit.* p. 417.

⁵ See provisions of Brazil cited above, p. 130.

itself constitute a kind of snare, for it is difficult, and sometimes practically impossible, for a person to know the exceptional burdens or obligations which the performance of certain acts would entail.

On the other hand, to issue regulations similar in effect to those of Mexico,¹ whereby the foreigner who performs certain acts may elect for the local nationality, has nothing in itself that may be criticised as causing a hardship to the foreign element of the community. On the contrary they are placed in a favourable position if they perform certain acts, and wish to abandon their nationality in favour of that of the place where they live. Should they wish to retain their original nationality, no special duty is imposed upon them when they perform the acts that may help them in the acquisition of the rights of citizenship.

With regard to naturalisation by operation of law in case that the foreign subject has accepted any public functions,² we may say that we fail to see any grounds that may be brought in order to criticise it adversely. There is a universal belief that foreigners should not take part in the performance of acts having in themselves a political or public nature. If, nevertheless, they do so, and the acts in question bring upon them special liabilities in virtue of the local law, there seems to be no reason for exonerating them. The performance of such acts cannot in any way be said to be necessary for their residence in the foreign country. Hall is emphatic when he says that "if the individual does acts of a political, or even, possibly, of a municipal nature, without inquiry whether the law regards the performance of such acts as an expression of desire on his part to identify himself with the State, he has no ground for complaint if his consent is inferred, and if he finds himself burdened upon the State territory with obligations correlative to the privileges which he has assumed."³

IV.—NATURALISATION.

Naturalisation is an act of sovereignty, whereby a State admits a foreigner to the number of its nationals. Naturalisation properly so-called implies an agreement between the State that grants it and the individual who accepts it. As it is an act of sovereignty it necessarily follows that each State is at liberty to issue by its municipal law any regulation it likes, prescribing the conditions, the formalities, the nature, and the effects of naturalisation. As a consequence of this fact there exist great divergences in the legislation on this subject, bringing thereby frequent conflicts between the different members of the international family. The acquisition of a new nationality carries with it, theoretically at least, the necessity to abandon the original nationality. But it must be stated at once that all States have not recognised yet that a

¹ See p. 136 *ante*. A foreigner married to a native woman is placed in a favourable position for naturalisation in Argentina, Brazil, Panama, and Uruguay.

² See p. 136 *ante*.

³ Hall, *International Law*, 5th ed. p. 216.

person possesses the so-called *innate* or *primordial* right to renounce his allegiance. Germany still maintains the permanent character of nationality even when her subjects have obtained effective naturalisation in a foreign country, unless they have been authorised to change their nationality and thus break the original bonds of allegiance. Allegiance is claimed by Argentina and Venezuela from their citizens even when they have been naturalised in foreign countries.¹

Each country has the right to prescribe which State-organ has the right of granting naturalisation when the requirements of the law have been fulfilled. In Paraguay, after Congress has declared who are entitled to be naturalised, the President of the Republic will despatch the corresponding letters of naturalisation. Thus it is necessary to pass a special law.²

In some countries the chief of the Executive power is invested with the prerogative of granting or refusing letters of naturalisation. This is the law of Brazil,³ Colombia,⁴ Costa Rica,⁵ Ecuador,⁶ Guatemala,⁷ and Nicaragua. In Mexico and Uruguay this right is ascribed to one of the Secretaries of State, while in Argentina it is left to the tribunals to appreciate whether the candidate has fulfilled the requirements prescribed by the law. Finally there are countries which require simply the inscription in the civil register or a declaration before the municipal council of the district in which they reside, provided they fulfil the other conditions prescribed by law.

A certain period of residence⁸ is generally required in order to apply for naturalisation. In Bolivia⁹ foreigners who after one year's residence express their wish to become domiciled may apply for naturalisation papers. The same enactment exists in Chile,¹⁰ Costa Rica,¹¹ and Ecuador,¹² but the candidate must be the owner of real property, or of capital invested in some business or industry, or exercise some science or art.

The simple fact of residence for two years is sufficient to enable a person to apply for naturalisation according to the legislation of Brazil,¹³ Honduras,¹⁴ and Nicaragua.¹⁵ Residence by the candidate for an equal period of time and the further requisite of possessing some real estate or working capital,

¹ Cited by Bonfils, *Manuel de Droit International Public*, cinquième édition, p. 243. In this connection it may be mentioned that Art. 7 of the Constitution of Ecuador, 1897, provides that "No Ecuadorian citizen, even though he may acquire another nationality, shall be exempted from the duties imposed by the Constitution and the laws, so long as he remains domiciled in the Republic."

² Constitution of Paraguay, Art. 37. Similar provisions obtain in Belgium, Denmark, and Luxemburg. ³ Law of November 12, 1902, Art. 4.

⁴ Law of November 26, 1888, Art. 18.

⁵ Law of December 21, 1886, Art. 10.

⁶ Law of August 25, 1892, Art. 15.

⁷ Law of February 21, 1894, Art. 36.

⁸ No fixed period of residence is required by the legislation of Peru. It is sufficient if the foreigner "is residing" there and exercises some trade, industry, or profession.

⁹ Constitution of Bolivia, 1880, Art. 32 (2).

¹⁰ Constitution of Chile, 1886, Art. 8.

¹¹ Law of December 21, 1886, Art. 8.

¹² Constitution of Ecuador, 1897, Art. 6 (5).

¹³ Law of November 12, 1902, Art. 5.

¹⁴ Constitution of Honduras, 1904, Art. 8 (2).

¹⁵ Constitution of Nicaragua, 1893, Art. 8 (2).

or professing some science, art, or industry, are required in Guatemala,¹ Mexico,² and Paraguay.³

Foreigners can obtain letters of naturalisation in Uruguay if they have fought as officers in the Uruguayan army or navy, or if they are married and profess some science, art, or industry, or own capital invested in business or real property and have in addition resided three years in the country; in the event of their being unmarried and possessing either of the preceding qualifications, four years' residence in the country are required.⁴

In Cuba foreigners cannot obtain the privileges of nationality unless they have resided for five years in the territory of the Republic; they must also have applied two years before the time for the granting of the letters of naturalisation would take place.⁵

The country that requires the longest period of residence by the foreigner in order to extend to him the rights and duties of nationality is the Republic of Panama. It is there prescribed that the candidate should have resided in the country during at least ten years, also that he should profess some science, art, or industry, or own landed property or capital in circulation. A six years' residence is sufficient if he is married and has a family in the country, and three years if married to a Panamanian.⁶

Finally the condition of residence is dispensed with in certain countries in case of a foreigner married to a native woman, of an owner of real property, or if the candidate has children born in the country, or is officially employed by the government.⁷ In this connection it may be mentioned that certain persons may obtain naturalisation as a special grace from the Legislature in virtue of special services or eminent merits; in such a case it is not necessary for the candidate to fulfil the ordinary prescriptions of the law. There is legislation to this effect in Chile, Ecuador, Paraguay, and Uruguay.

Besides the general requisite of residence the person to be naturalised must prove that he has attained his majority,⁸ and that he has properly conducted himself as a man and a citizen. Costa Rica,⁹ Honduras,¹⁰ Mexico,¹¹ and San Salvador¹² have expressly declared that naturalisation papers will not be given to persons reputed or considered in other countries as pirates, slave-dealers, incendiaries, forgers of coins, bank-notes or other

¹ Law of February 21, 1894, Art. 86.

² Law of May 28, 1886.

³ Constitution of Paraguay, Art. 36. This period may be abbreviated if the foreigner be married to a Paraguayan woman, and if he prove services in behalf of the Republic.

⁴ Constitution of Uruguay, Art. 8.

⁵ Constitution of Cuba, 1901, Art. 6 (3).

⁶ Constitution of Panama, 1904, Art. 6 (3).

⁷ See, e.g., Law of Brazil of November 12, 1902, Art. 6; Law of Mexico of May 28, 1886, Art. 1.

⁸ The majority spoken of here is in some States according to the laws of the candidate's country, whereas in others it is in accordance with that of the place where the person is to be naturalised.

⁹ Law of December 21, 1886, Art. 9.

¹⁰ Law of April 10, 1895, Art. 13.

¹¹ Law of May 28, 1886.

¹² Law of November 27, 1886, Art. 13.

papers representing a money value, nor to murderers, plagiarists, or thieves. In Brazil¹ no foreigner is allowed to be naturalised who, either in the country or abroad, has been convicted or sentenced for homicide, theft, robbery with violence, bankruptcy, forgery, smuggling, embezzlement, false coining, or procuring.

In some countries it is also enacted that a person whose State is at war with that of which he seeks to be a member is disqualified for obtaining the privileges and obligations of nationality.² And even when the person has been naturalised he is not, according to the legislation of some countries, compelled to bear arms against the country of his birth.³

It is of importance both from a theoretical and a practical point of view to know what is the effect of the naturalisation of the husband on the person of the wife. In Argentina, Bolivia, Brazil, Chile, Guatemala, Honduras, Nicaragua, Paraguay, Peru, and Uruguay there is no enactment dealing with this question. The wife is made to follow the nationality of the husband without any reference as to her domicile in Colombia,⁴ Costa Rica,⁵ Cuba, Ecuador,⁶ and Venezuela; whereas in Mexico⁷ and San Salvador⁸ she is naturalised *ipso facto* by the naturalisation of her husband provided she takes up her residence in the country in which the husband has obtained letters of naturalisation.

The same want of provisions for ascertaining the effect of the naturalisation of the father on the person of his minor children is noticeable. We have been unable to find enactments dealing with the subject in Bolivia, Chile, Guatemala, Honduras, Nicaragua, Paraguay, Peru, and Uruguay. It is provided by the laws of Mexico⁷ and San Salvador⁸ that the children are made nationals of those States by the naturalisation of the head of the family, if they reside in the country that their parents adopt. In Ecuador⁹ such minors are also naturalised, but they have a right of option on attaining the age of twenty-one years. In Argentina and Brazil they are not naturalised *ipso facto*, but great facilities are afforded them: thus in the former they can obtain letters of naturalisation by incorporating themselves in the national guard,¹⁰ and in the latter they have only to make an application when attaining their majority. Finally in Colombia¹¹ and Venezuela they are naturalised by the act of the head of the family, without leaving them any option when coming of age.

The foreigner, as soon as he is naturalised, is entitled to exercise all

¹ Law of November 12, 1902, Art. 13.

² See, e.g., in Costa Rica, Law of December 21, 1886, Art. 13; in Honduras, Law of April 10, 1895, Art. 12.

³ See, e.g., for Colombia, Constitution of the Republic, 1886, Art. 13; for Panama, Constitution of the Republic, 1904, Art. 10.

⁴ Law of November 26, 1888, Art. 17.

⁵ Law of August 25, 1892, Art. 19.

⁶ Law of September 29, 1886, Art. 3.

⁷ Law of October 1, 1869, Art. 3.

⁸ Law of December 21, 1886, Art. 6.

⁹ Law of May 28, 1886, Art. 2 (4).

¹⁰ Law of August 25, 1892, Art. 19.

¹¹ Law of November 26, 1888, Art. 17.

civic and political rights. It is, however, expressly provided by most States that only native-born citizens are qualified for filling the post of President or Vice-President. Some countries disqualify naturalised persons for being appointed Senators or Deputies, whereas in others if a foreigner is to exercise either of these offices, he must have obtained letters of naturalisation for a certain period, varying from four to six years.

Some of the Central and South American States have actually incorporated in their legislation a clause which tends to avoid international conflicts similar in nature to that created by the pretentious action of the United States in claiming a right to protect one Martin Kotza, an Austrian subject. Thus it has been enacted in Costa Rica,¹ Guatemala,² and San Salvador³ that a change of nationality does not produce retroactive consequences, that is to say, the obtaining or the recovery of immunities attached to the local nationality cannot be made available before the date on which naturalisation is granted; the persons naturalised are not thereby relieved of the obligations contracted by them in their country of origin before their denationalisation.⁴

A group of countries, in order to avoid vexatious conflicts of this nature, have expressly provided that if one of their citizens becomes naturalised in a foreign State he thereby loses his original nationality and therefore his right of protection from his native country. This is the law in Brazil,⁵ Chile,⁶ Costa Rica,⁷ Guatemala,⁸ Honduras,⁹ Mexico,¹⁰ and Peru.¹¹ In San Salvador¹² the citizen who obtains naturalisation from a foreign country in order to be considered as an alien must remove his residence from the Republic.

We have now shown the main path followed by Latin America in connection with nationality and naturalisation. It is easily seen that the tendency that prevails is to assimilate, as far as possible, with the national element the foreign members of the community. This is the reason why the *jus loci* is generally adopted, and the requirements for obtaining naturalisation are made comparatively easy. These nations possess vast territories which have not been fully exploited yet, while their population is scarce. It is, therefore, of supreme importance for them that immigrants should, as far as circumstances would allow, consider themselves as invested with national rights and duties, for if this line of action were not adopted,

¹ Law of December 21, 1886, Art. 12.

² Civil Code, Art. 53.

³ Law of September 27, 1886, Art. 18.

⁴ See, e.g., for Brazil, Law of November 12, 1902, Art. 3; for Honduras, Law of April 10, 1895, Art. 7; for Mexico, Law of May 28, 1886, Art. 8.

⁵ Constitution, Art. 71.

⁶ Constitution.

⁷ Law of December 21, 1886, Art. 4 (1).

⁸ Law of February 21, 1894, Art. 4.

⁹ Law of April 10, 1854, Art. 1 (4).

¹⁰ Law of May 28, 1886, Art. 2 (5).

¹¹ Constitution, Art. 2 (5).

¹² Law of September 29, 1886, Art. 2 (4).

these countries would be placed in "the anomalous position of having many inhabitants but few citizens."¹

Another consideration of no small importance that is bound to exert its influence on the policy of those countries in this connection is their desire to shield themselves from the exorbitant claims of some of the powerful States when one of their subjects deems himself injured while he is established in Latin America by the actions of the State. When this is the case it is comparatively easy for such individual to remember what he considers to be his original allegiance and demand the corresponding protection.

It is quite possible that this tendency on the part of the Latin American Republics has led some writers to indulge in generalisations, in an exaggerated manner, when dealing with the imposition of nationality by those States. We hope, however, to have shown how far such statements are correct.

¹ It has been expressly enacted in Brazil, Colombia, Honduras, Mexico, and San Salvador that all proceedings relating to the naturalisation of foreigners are exempt from all charges, stamps, and fees. We have not been able to find provisions in the other Latin American countries to this effect, but it is probable that the same practice is followed.

DR. MEYER'S BILLS OF EXCHANGE DRAFT CODE FROM AN ENGLISH POINT OF VIEW.¹

[Contributed by ERNEST J. SCHUSTER, ESQ., LL.D. (*Munich*).]

I.—INTRODUCTION.

IF one day the unification of Bills of Exchange Law becomes an accomplished fact, this will be mainly due to the wide learning, the indefatigable energy, and the undaunted perseverance of my valued friend Dr. Meyer, whom we have the pleasure of seeing amongst us on this occasion.

By his work on the Bills of Exchange Laws of all nations, and by the Draft Code which is the subject of this paper, he has rendered a service to the science of comparative law which will never be forgotten, and which—whatever the immediate fate of his proposals may be—will be the corner-stone on which any scheme of unification must be erected.

His work is rightly based on the consideration that unification is impossible unless those concerned in its promotion possess an intimate knowledge of all the systems which it is intended to unite, and on the further consideration that a mere statement of general principles is insufficient, and that unless you test the principles by trying to embody them into a complete Code, you have no guidance as to their practicability or sufficiency.

I have said that Dr. Meyer's work on comparative Bills of Exchange Law and his Draft Code must be the corner-stones on which any scheme of unification will ultimately have to be erected, but by this I do not mean that an English translation of his draft either in its present or in any modified form ought to be enacted as the law of this country.

I will not dwell on the general objection to the introduction of apparently uniform law into countries using different languages and being under

¹ Paper read at the Conference of the International Law Association on August 5, 1910. The Draft Code which is the subject of the paper was prepared by Dr. Meyer, a member of the Berlin Court of Appeal, on the instructions of the Representative Commercial Body of Berlin, and was published as part of a comprehensive work of which the first volume gives a detailed comparative survey of the Bills of Exchange Laws of all civilised countries, whilst the second volume contains the draft with elaborate notes and an appendix containing the Buda-Pesth Rules and other material relating to the proposed unification of Bills of Exchange Law.

different social and historical influences, as this would lead me too far away from the immediate subject of this paper. I will, therefore, confine my remarks to the question as to the possibility or desirability of turning the translation of this draft into a British statute. Having done that, I propose to explain in what manner and to what extent British legislation might advantageously make use of Dr. Meyer's suggestions in connection with the proposed unification scheme.

II.—REASONS AGAINST THE ADOPTION OF A TRANSLATION OF DR. MEYER'S DRAFT.

One of the chief reasons which speak against the adoption of a translation of Dr. Meyer's draft is connected with the fact that this would have the consequence of splitting up the law as to bills of exchange into two separate parts. Dr. Meyer has rightly eliminated all questions relating to the so-called material or civil law relating to bills of exchange; his draft, therefore, does not deal with any question as to "value" or "consideration," as to the mutual rights of parties to accommodation bills, as to the right to the funds in the hands of a drawer, or other similar matters. He also, for good reasons, excludes the whole law relating to cheques. Now all these topics are dealt with by our Bills of Exchange Act, and if we adopted a translation of Dr. Meyer's Draft Code, we should, at the same time, have to enact a second Code referring to the omitted matters. This would introduce a complication which no lawyer of any experience can consider with indifference.

In the second place, the following important fact must be urged against the adoption of a translation of the draft. The statute law of every country has its own modes of expression, and this is seen in two ways: some words which in ordinary language are used in a fairly wide sense are used in a much narrower sense in the language of statutes. A conspicuous example may be found in the amended version of s. 15 of Dr. Meyer's draft (on p. 414) where the words *muss* and *soll* convey meanings which their English equivalents "must" and "shall" do not convey. An English translator who knows the distinction will no doubt give effect to it; but where is the translator to be found who is so well versed in all the niceties of German and English legal expressions that he could do full justice to the difficult task of translating the whole text of the draft? The difficulty of translation is further increased by the difference in the structure of legal phraseology. In English legal language accuracy of expression is the one thing aimed at; in the German language the desire for conciseness prevails. Owing to this difference English Courts construe an English statute in a manner differing entirely from the manner in which German Courts construe German statutes. Under these circumstances, a complete translation of Dr. Meyer's draft—which, of course, adopts the German method—would probably in many parts be interpreted

in England in a manner substantially differing from the manner in which it would be interpreted in Germany.

The third reason against the enactment of an English Bills of Exchange Law reproducing in an English garb Dr. Meyer's Code is, in my opinion, as weighty as the two others. Many rules which, owing to the existence of provisions outside of Bills of Exchange Law, operate fairly in one country, would operate less fairly in other countries where similar outside provisions do not exist. Thus the rigid rules about the loss of the right of recourse and the extinction of rights, after a short period of prescription, contained in Dr. Meyer's draft, cannot cause much injustice in Germany, where the so-called "Bereicherungsklage" enables the aggrieved person to recover any unjust benefit acquired by any party through the operation of these rules; but in England, where such a right of action does not exist, strict insistence in the forfeiture of the right of recourse in any case where the pursuit of formalities has not been duly observed, and the introduction of a short period of prescription, would cause much greater injustice.

III.—SUGGESTIONS AS TO THE ADOPTION OF DR. MEYER'S PROPOSALS.

A.—GENERAL OBSERVATIONS.

I have now reached the third part of the paper. It may possibly be said that whilst I have praised Cæsar in the first part, I have attempted to bury him in the second; but in the third I have the much more welcome task of resuscitating him. The proper use that, in my opinion, can be made in this country of Dr. Meyer's draft—or of any modification thereof which is likely to gain universal assent—is to embody the substance of its main provisions, in so far as they appear acceptable, in a new Bills of Exchange Act which would take the place of the Acts of 1882 and 1906. In connection with this purpose I propose to show how Dr. Meyer deals with the principal questions, and to express my opinion as to his suggestions on the matters to which they relate.

B.—THE ESSENTIAL PARTS OF A BILL OF EXCHANGE.

In his proposals as to what are in future to be considered the essential parts of a bill of exchange, Dr. Meyer has gone very far to meet what on the Continent is called British prejudice, but what we here describe by more complimentary terms. In the amended edition of s. 15 (p. 414), the mention of a date of issue and of a place of payment is no longer an essential requisite, and even as regards the insertion of a term similar to the expression "bill of exchange" into the text of the document—for which essential many continental lawyers are prepared to die in the last ditch—Dr. Meyer is in a very accommodating disposition. According to

this proposal the absence of such an indication does not prevent a document from being deemed a bill of exchange if words like "to the order" or "not to order," or other words having a similar connotation, are inserted. The application of a little pressure will probably induce him to give way on this point also. This would mean that no requirement would in the unified Bills of Exchange Law be deemed essential which is not deemed essential in British Bills of Exchange Law at the present moment. This is as it should be; for, as stated in the Memorandum of the Institute of Bankers addressed to the Board of Trade in response to a request for an expression of opinion as to the proposed unification of Bills of Exchange Law, no international arrangement would be acceptable to the commercial community of this country by which any new formal requirement would have to be introduced into British law.

C.—EFFECT OF FORGED INDORSEMENTS.

A question of considerable importance arises in each case in which a person in good faith acquires a bill of exchange which without the true owner's assent has gone out of his possession. In order not to introduce any too complicated problems, I wish at present only to consider the case of a person who takes a bill on which the thief has forged the true owner's endorsement. Under the present English law such a person acquires no title to the bill. An acceptor who pays the amount of the bill to its actual holder remains liable to the true owner, notwithstanding that payment, but he may recover the amount paid from the person by whom the payment was received. An exception to this rule exists in the case of cheques,¹ but at the present moment I exclusively refer to such bills of exchange as are not cheques. The British rule, as may easily be shown, is very unjust in its operation, and, moreover, leads to anomalies as, in the case of the negotiation having taken place in a locality in which a title acquired in good faith through a forged indorsement is held to be good, such title will also be recognised by a British Court.² The rule of German law which in a somewhat modified form has been embodied in s. 48 of Dr. Meyer's draft, under which a continuous chain of indorsements confers a good title, considerably facilitates the negotiation of bills of exchange, and being less liable to create hardships than the English rule, ought to be generally adopted. I think, however, that Dr. Meyer's clause goes somewhat too far, inasmuch as it compels an acceptor to pay, even if he knows that an indorsement is forged, and has reason to doubt the good faith of the subsequent holders. No doubt s. 106 of Dr. Meyer's draft gives the true owner the right to recover the bill from a person

¹ See Bills of Exchange Act, 1882, ss. 24, 60, 82; Bills of Exchange (Crossed Cheques) Act, 1906.

² See *Embirkos v. Anglo-Austrian Bank*, (1904) 2 K.B. 870, (1905) 1 K.B. 677.

who has acquired it in bad faith; but as s. 48 stands at present, the true owner could not restrain the acceptor from paying the bill while the proceedings for the recovery of the bill are pending.

D.—HOLDER'S DUTIES WITH REFERENCE TO PRESENTMENT FOR
ACCEPTANCE.

The various questions arising as to the duty of a holder to present a bill for acceptance are among those in respect of which an international agreement is most desirable. Dr. Meyer's solution, on the whole, meets the requirements of commercial intercourse, but in some points his recommendations require amendment.

Dr. Meyer (in s. 39) lays down the general rule that, in the absence of a direction to the contrary, the holder of a bill is not in any case bound to present it for acceptance, but as this would obviously cause inconvenience with regard to bills payable after sight, he introduces in s. 43 a presentment for the purpose of fixing the date which is not meant to be a presentment for acceptance. I must honestly confess that I cannot conceive any circumstance under which the holder of a bill, having once gone to the trouble of presenting it to the drawer, could wish to refrain from procuring its acceptance, and I therefore think that the rule now prevailing here, as well as in most other countries, under which a bill payable after sight must be presented for acceptance, ought to be upheld.

On the other hand, I agree with Dr. Meyer in his wish¹ to abrogate the rule now existing in British law under which a bill must be presented for acceptance in any case in which it is drawn payable elsewhere than at the drawer's residence or place of business (Bills of Exchange Act, 1882, s. 39 (2)). The rule leads to obvious inconvenience in any case where the bill is received so late that it cannot be returned accepted before maturity, and the way in which this inconvenience is met by s. 39 (4) of the British Bills of Exchange Act can hardly be deemed satisfactory.

The question as to the time within which a bill payable after sight must be presented for the purpose of fixing the date of payment is dealt with by s. 43 of the draft, which provides that, in the absence of any direction requiring a speedier presentment, the presentment must take place within four months from the date of issue. Under British law (Bills of Exchange Act, s. 40) a bill payable after sight must be presented for acceptance *or negotiated* within a reasonable time. This is more favourable to holders than Dr. Meyer's proposal, but the right to substitute negotiation for presentment may have the effect of unduly retarding the presentment. As Dr. Meyer's four months allow a delay which in many cases would

¹ See the observations on p. 149 of his vol. ii.

appear to be excessive, I should suggest a combination of the two provisions, so as to make it incumbent on the holder of a bill payable after sight to present or negotiate it within a reasonable time, but with a proviso that in any case the presentment must be effected within four months after the date of issue.

The rule of British law (Bills of Exchange Act, 1882, ss. 48, 51 (2)) under which a holder who presents a foreign bill for acceptance, notwithstanding the fact that in the particular circumstances he would have been under no obligation to do so, forfeits his right of recourse unless he gives immediate notice of dishonour and takes out a protest, is inconvenient and unnecessary. If the drawer or any endorser wishes to receive immediate notice of dishonour by non-acceptance he can easily attain this object by inserting a direction in the bill or in his indorsement requiring the bill to be presented for acceptance within a stated period (see Bills of Exchange Act, 1882, ss. 33, 40 (2); Dr. Meyer's draft, s. 39 (3)). A person who, though wishing to receive speedy notice of dishonour fails to take this precaution cannot complain if the non-acceptance of the bill remains unknown to him.

E.—HOLDER'S RIGHTS IN CASE OF NON-ACCEPTANCE.

Dr. Meyer, in his s. 84, rightly adopts¹ the rule of British and American law (see Bills of Exchange Act, 1882, s. 43) under which an immediate right of recourse against the drawer and indorsers accrues to the holder of a bill dishonoured by non-acceptance. The reasons speaking in favour of a universal adoption of this rule are so obvious that they require no special mention.

It follows as a necessary corollary of this rule that the holder of a bill dishonoured by non-acceptance is not bound to consent to acceptance for honour of the drawer or of an indorser which would deprive him of his immediate right of recourse (see Bills of Exchange Act, 1882, s. 65 (1); Dr. Meyer's draft, s. 70). If, as is now the case in some continental countries, the holder were bound to consent to an acceptance for honour, the drawer could in every case indicate an addressee, in case of need, whose possibly worthless acceptance would frustrate the holder's right to be reimbursed if the original drawee fails to accept.

F.—PARTIAL ACCEPTANCE.

It would lead me too far to enter into a full discussion on the thorny subject of qualified acceptance, which plays an important and, on the whole, not very satisfactory part of British Bills of Exchange Law (see Bills of Exchange Act, 1882, s. 19). I propose to confine myself to the

¹ See his interesting statements on the present continental law and the desirability of a change in the sense indicated in the text on pp. 278-80 of his book.

question whether it is desirable that the holder of a bill should be compelled to consent to its acceptance for part only of the sum for which it is drawn. Under British law the holder may refuse a partial acceptance; under the present continental law he is, on the other hand, bound to consent to it. Dr. Meyer wishes to maintain the continental rule (see ss. 36, 37 of his draft), and (unless his s. 84 be amended, so as to give a right of recourse in respect of the deficiency) this will lead to the result that the holder of a bill for £1,000 which is accepted for one shilling must await the maturity of the bill before he can exercise any rights against the indorsers and the drawers. It would, of course, be easy to amend the clause so as to prevent this possibility, but if this were done other complications would ensue. In my opinion the British rule should be made universal.

G.—INDICATION OF PLACE OF PAYMENT IN ACCEPTANCE.

By virtue of s. 15 of Dr. Meyer's Draft Code in its amended form, the place of payment, that is to say, the town in which the bill has to be presented for payment and paid, though not expressly indicated in the bill, must always result from the tenor of the bill itself, and cannot be altered by the acceptor without the consent of all other parties. The acceptor can, however, by virtue of s. 35, indicate a particular locality within the town where payment has to be made, or a particular person or firm through whom the payment has to be effected. This is obviously right and convenient. The present English law gives the acceptor much wider powers; he may accept the bill payable in any town he chooses, and the holder has no right to object if he chooses a town other than the town in which he resides or carries on business. I have had personal experience of bills drawn on a London firm being accepted payable in some small provincial town, and there is nothing in the Bills of Exchange Act to prevent it.¹ An amendment of the British law on this matter in the direction indicated by Dr. Meyer's s. 35 is eminently desirable.

H.—HOLDER'S DUTIES AS TO PRESENTMENT FOR PAYMENT.

In discussing the questions arising under this head, I refrain from speaking about the British days of grace. It is admitted on all sides that they must go, and it will accordingly be understood that when I speak of the due date of a bill I mean the date resulting from its literal tenor. A bill drawn at three months' date from July 1 will, if the unification scheme is carried out, be due on October 1, and when speaking of its due date

¹ A bill accepted payable in a town other than the town in which the drawee resides or carries on business and not indicated as place of payment on the face of the bill, cannot under British law be protested for non-acceptance unless the indication "and not elsewhere" is added to the place of payment, the reason being that the acceptor in such a case is bound to pay in any place in which the bill is presented to him. This reason does not, however, remove the inconvenience.

in the course of this paper I mean October 1 and not October 4. Under Dr. Meyer's draft a bill may—leaving aside the question of holidays, to which I shall have to refer hereafter—be presented for payment on the due date and may be treated as dishonoured by non-payment if it is not paid on that date, but the holder does not forfeit any rights so long as the bill is presented not later than the second working day after the due date. Under the present British law this facility is not given, that is to say, the bill must be presented on the first day on which non-payment gives the right to treat a bill as dishonoured. In my opinion this has not caused any particular hardship, but if it should be desired to give the holder a little more latitude I think one day would be amply sufficient.

The question as to the effect of holidays cannot be decided on principle; in England, Sundays, Good Friday, and Christmas Day operate in one direction, while Bank holidays operate in the opposite direction. Dr. Meyer's proposals (s. 9) that the working day next following the due date should be the date of payment is clearly acceptable.

As regards the time within which bills payable on demand (other than cheques) must be presented for payment, the present English rule is not entirely satisfactory. The rule as laid down by the Bills of Exchange Act, 1882, s. 45, as regards preservation of the right of recourse, draws a distinction between the different parties. As between the holder and the drawer a bill must be presented within a reasonable time after the date of issue, and as between the holder and any particular indorser it must be presented within a reasonable time after the date of his indorsement. The effect of this provision is always uncertain and sometimes unjust, but I cannot say that Dr. Meyer's proposal (s. 47), according to which the time within which a sight bill must be presented is, in the absence of a direction to the contrary, fixed at four months after the date of issue appears more attractive. I should, as in the case of bills payable after sight, recommend the establishment of a maximum period of four months after the date of issue, and should at the same time require each holder to negotiate or present a sight bill within a reasonable time after coming into its possession.

In connection with this point it is necessary to refer to the opinion expressed by Dr. Meyer (see s. 47 of his draft and his observations on p. 168) according to which the holder of a sight bill who does not require its immediate payment ought to be able to obtain the drawee's acceptance, and that after having procured such acceptance he ought to be at liberty to postpone presentment for payment while the period of four months after the date of issue has not as yet run out. Quite apart from the question as to whether on general principles the acceptance of a sight bill ought to be permitted,¹ there are serious objections to the power in question

¹ In England sight bills on presentation are frequently accepted payable with a banker, but this has practically the same effect as payment by a cheque on the banker—see the note to s. 41 (1) (a) in Chalmers' edition of the Bills of Exchange Act.

being given to a holder. A sight bill when it reaches the place of payment should always be presented for payment as speedily as possible.

As regards the question as to what is the proper place for presentment, Dr. Meyer in his amended s. 15 (see also ss. 35 and 44) adopts provisions similar to those contained in s. 45 (4) of the British Bills of Exchange Act, 1882.

I.—HOLDER'S RIGHTS AGAINST DRAWEE AND ACCEPTOR.

Under the present Scotch law (Bills of Exchange Act, 1882, s. 53 (2))—as also under some other systems of law—a bill operates as an assignment of funds; that being so, the holder of a bill, having knowledge of the fact that funds intended to provide for the payment of such bill have been placed into the drawee's hands, has a direct remedy against the latter. Under English law and most other Bills of Exchange Laws the holder, as such, has no rights whatever against the drawee of a bill. Dr. Meyer in my opinion rightly adopts the last-mentioned rule.

As against the acceptor the holder of a bill has in all countries a direct claim. Under English law this claim (subject to certain exceptions which may be disregarded for the present purpose) remains in force notwithstanding the fact that the bill was not presented for payment at the proper time, and that no protest was taken out or notice of dishonour given (see Bills of Exchange Act, 1882, s. 52 (1), (3)). Under the former German law the holder's right against the acceptor was, in the case of domiciled bills, forfeited, if the bill was not presented at the proper time at the place of payment, but this provision was repealed in 1908; Dr. Meyer's draft rightly maintains the principle that as between the holder and the acceptor no duty arises as to presentment, notice of dishonour, or protest.

Under the present law of most countries the acceptor, in the event of the holder failing to present the bill for payment at the proper time, satisfies his obligation by paying the amount of the bill whenever it is presented to him for payment. Dr. Meyer, by his ss. 54 and 55, proposes to abrogate this rule and to leave the acceptor¹ the option of paying the amount into court or to pay interest from the date of payment. I should have a great deal to say about the objections to this proposal, but as I understand from a private communication I have received from Dr. Meyer that he is willing to drop the proposal, it is unnecessary to refer to it at greater length.

J.—RIGHT OF RECOURSE.

Under English law the exercise of the right of recourse in case of the dishonour of a foreign bill by non-payment depends on compliance with three conditions: the bill must have been presented at the proper time; protest

¹ Even a drawer who has not accepted, but is willing to pay the amount of the bill, is not to be entitled to the delivery of the receipted bill unless he adds the interest.

must have been taken out at the proper time;¹ and notice of dishonour must have been given at the proper time. As regards compliance with each of these conditions, relaxations of the rule and exemption are allowed so as to meet special cases of hardship or injustice (see Bills of Exchange Act, ss. 46, 50, 51 (9)), but subject to such relaxations and exemptions non-compliance with the rules entirely loses the right of recourse.

Under Dr. Meyer's draft (see ss. 49, 56, 86) the omission to present and protest a bill at the proper time causes the forfeiture of the right of recourse without any reference to the mutual positions of the parties, but failure to give notice of dishonour, though making the defaulting party liable in damages, does not itself cause the forfeiture of the right of recourse (see s. 67).

The rigidity of Dr. Meyer's rule as to the consequences of the omission to present and to take out protest at the proper time is, as I have already explained, mitigated by the fact that the outside law in Germany allows a "*Bereicherungsklage*" which prevents any person from deriving an unjustifiable benefit through the forfeiture of the right of recourse. In a country like England, where this kind of action does not exist, the absence of relaxation and exemptions would in many cases operate harshly and unjustly.

As regards the form of the protest, Dr. Meyer (in s. 61) adopts the newly introduced provisions of the German Bills of Exchange Code (Art. 88a), according to which the protest instead of being contained on a separate instrument is to be placed on the bill. This is no doubt an advantage, as it saves the trouble of having a copy of the bill, and it is to be hoped that the limitation of space will curtail the length of the protest; a short statement like "Bill presented on July 19 at 1 p.m. to Charles Smith, partner in firm of acceptors. Replied: cannot pay. (Signed) Thomas Jones, Notary Public," is amply sufficient. These simplifications if introduced will, it is hoped, also reduce the costs of protest, which at the present moment are absurdly high in this country.

Dr. Meyer's proposal (s. 67) to shift the duty of giving notice of dishonour on the official by whom the protest is taken out (except in cases where no protest is required) does not recommend itself to me. As his clause is worded the official in question would himself have to bear the consequences of any neglect or omission, and the additional trouble and risk thus imposed on him would of course have to be paid for by an increase of the charges.

As far as my own experience goes the practice and theory as to notice of dishonour are widely apart; the holder of a bill on which default has been made as a general rule returns it to the person from whom he received it, who in his turn returns it to the previous indorser, and no further notice of dishonour is given. Under s. 49 (6) of the British Bills of Exchange Act the return of a dishonoured bill to the drawer or an indorser is in

¹ For the sake of brevity I do not notice the exceptions arising in cases in which directions dispensing with protest are given by the drawer or any indorser.

point of form a sufficient notice of dishonour, but such notice operates as against the particular party to whom the bill is returned, and events are conceivable in which the omission to give notice to the other parties may prejudicially affect the rights of the person by whom the bill was presented for payment; the possibility of such an event occurring is, however, very remote, as each indorser on receiving the returned bill will naturally protect himself by forwarding the bill to the person who indorsed it to him. However this may be, as between the party who returns a bill and the party to whom it is returned, no other notice should be required.

At first sight Dr. Meyer's proposal to preserve the right of recourse in the case of omission to give notice of dishonour, but to make a party guilty of such omission liable in damages, appears to be to the holder's advantage, but this is not always the case. If the party from whom the bill was originally received is solvent, the right of recourse against other parties is quite immaterial to the holder, and if the loss of the right of recourse is the only consequence of the failure to give notice to such other parties, the practice of omitting the notice in their case cannot be hurtful; if, however, each party can claim damages in any case in which the omission to give notice has injured him, the matter becomes much more serious.

Nobody who has any experience of the large number and partial illegibility of the indorsements which sometimes appear on bills coming from the Continent can look with equanimity on a proposal which makes it a practical necessity to give notice of dishonour to the drawer and to every person whose name appears as an indorser.

K.—PAYMENT FOR HONOUR¹ OF THE DRAWER OR AN INDORSER.

Under the present German law the holder of a bill on which the name of a referee "in case of need" appears, must in the case of default of payment present it to such referee if he resides or carries on business in the place where the bill is payable (Art. 56). Under British law (Bills of Exchange Act, 1882, s. 15) presentment to the referee in case of need is optional; Dr. Meyer (in s. 69) adopts the British Rule, but his reasons for this course do not convince me. As a matter of practice the references in case of need are usually resorted to on the non-payment of a bill, and I think it is on the whole desirable that this should be done, as a drawer or indorser who has indicated a referee in case of need may be exposed to a serious loss if the holder fails to take advantage of the indication; where the reference is to parties with an ascertainable address at the place of payment the inconvenience to the holder is not very great. I should therefore recommend the adoption of the German rule.

¹ I omit to deal with the questions arising as to acceptance for honour, as their special discussion would occupy too much space.

Another divergence between English and German law is found in the fact that under German law no one except a person indicated on the face of the bill as a reference in case of need is entitled to intervene in case of default. Under s. 68 of the British Bills of Exchange Act any party may, in the event of a bill having been protested for non-payment, pay such bill for the honour of any party liable thereon, or for honour of the party for whose account the bill is drawn. In the case of competition between several interveners the one who liberates most parties has to be chosen. This rule has obvious advantages and has been rightly adopted by Dr. Meyer (s. 70). As I have spoken in favour of compulsory presentation to the addressee in case of need, I should of course recommend that in the case of a competition between a referee in case of need and a voluntary intervener, the same rule should be observed as in the case of a competition between several interveners.

IV.—CONCLUDING OBSERVATIONS.

I have had to pass over many matters which in my opinion call for special criticism or for special commendation. This course was necessitated by the limits of space which are imposed by the conditions of the occasion on which this paper is presented. Moreover, it is somewhat premature to enter into a minute examination of the draft before it has been remodelled—as it undoubtedly will be¹—by the deliberations of The Hague Conference. On the remodelled draft the bodies representing banking and commerce in this country will no doubt be called upon to pronounce an opinion, and then the time will have arrived for dealing with the whole subject in a comprehensive manner.

The opinions of men having practical experience of the incidents in the life of a bill of exchange, and more particularly of a bill of exchange which has travelled through several countries, will then have to be taken into account, and it will also be necessary to take into consideration the economic objects which a sound Bills of Exchange Law ought to have in view. An international bill of exchange is *drawn and negotiated* for various purposes: for recovering the price of goods or Stock Exchange securities forwarded from the drawer's country to the drawee's country; for taking advantage of a favourable exchange, or of a favourable rate of interest in the drawer's country; for the mere purpose of raising money, and for a variety of other purposes. A bill of this description is *purchased* with the object of paying for goods or Stock Exchange securities forwarded from the drawee's country to the purchaser's country; for the purpose of covering exchange or credit transactions, and for a variety of other purposes. In a particular place and at a particular time the person who wishes to negotiate

¹ I understand that The Hague Conference has in the meantime concluded its deliberations and agreed upon a Draft Code.

a bill for any of the purposes I have mentioned does not always meet with a person who wishes to purchase a bill for the corresponding purposes; moreover, the bills offered may be payable at distant dates, while the bills wanted may be sight bills or short-dated bills. In practice, this difficulty is overcome by middlemen who make it their business to be always ready to buy bills as they are offered, and to draw and sell bills as they are wanted. In the machinery of commerce the persons or firms who act as such intermediaries perform a most useful function, and a sound Bills of Exchange Law ought to consider them more than any other class of persons who are likely to be parties to bills of exchange; if unnecessary risks and troublesome formalities are imposed on such persons, they must recoup themselves by additional profits which must operate as a tax on all commercial transactions involving the use of bills of exchange, and therefore prejudice the interests of all other parties. These and similar considerations must not be lost sight of when a revision of British Bills of Exchange Law in connection with the unification scheme will come within the region of practical politics, but though they may in some respects lead to deviations from the path pointed out by Dr. Meyer, that will not detract from the gratitude and admiration which all persons interested in the matter must feel for the intrepid pioneer of the unification of Bills of Exchange Law.¹

¹ Since this article was written, "Correspondence relating to the Conference on Bills of Exchange at The Hague, June 1910," has been published: Commercial, No. 4 (1910).—*Note by Editors.*

BREACH OF PROMISE OF MARRIAGE.

[Contributed by EDWARD MANSON, ESQ.]

How marriage originated, whether it was an instinct of primitive man or grew out of a state of promiscuity or polygamy or the communal group, or superseded matriarchy, how it was affected by the customs of endogamy, exogamy, and totemism, all these questions make a "very pretty quarrel," as Sir Lucius O'Trigger would say, in the rival theories of Maine and McClennan, Morgan and Lang; and the anthropological experts must settle it: "procul, O procul este profani." But the institution of marriage being once started, it seems generally agreed that the favourite mode of carrying it on was from a very early period by the capture of brides. Capture in its turn yielded in time to purchase—still common among uncivilised races—and with purchase begins the long, long history of the marriage contract. Betrothal—a very ancient custom—was the preliminary bargain to settle the terms of purchase prior to the ceremony of marriage—the terms, be it observed, not merely the price. For the bride-sale was a very different thing from the sale of a slave girl, a mere chattel. When Abraham's servant comes to ask Rebekah's hand of her father Bethuel, and her uncle Laban, and brings forth jewels of silver and jewels of gold and raiment, Rebekah's kinsmen give her away to be Abraham's "son's wife,"—the only son—the son "to whom he had given all his wealth," to be the mistress in fact of a great patriarchal household.¹ In the earliest form of marriage at Rome, known as *coemptio*,² the bride was sold by *mancipatio* for an *as* in the presence of witnesses, but the *mancipatio* was only what we should call the formal conveyance—delivery of possession. It was preceded by a betrothal—*stipulatio*—securing to the bride the dignity and honour of a *materfamilias* and mistress of the household, and out of this stipulation an action for breach of promise—*actio ex sponsu*—arose among the Latin tribes: so says Servius Sulpicius, a jurist who died 42 B.C. In later times

¹ In the case of Jacob's betrothal to Rachel, there is a curious parallel to his serving his father-in-law Laban seven years for his bride in Mr. Northcote Thomas's *Marriage Customs of the Edo-speaking Peoples of Nigeria* (see p. 95 *supra*). In addition to payments he says, "When the bride is young the suitor does a certain amount of work on the farm of his future father-in-law, and helps him in such tasks as house-building."

² Some high authorities, it should be said, hold *confarreatio* to be the earliest.

the *sponsalia*, or ceremony of betrothal, took place at the house of the woman's father in the presence of the respective parents (*sponsores*), when the day of marriage was fixed and the marriage contract agreed. Parties to the *sponsalia* might still resile, and if they did, could not be compelled to complete the marriage; but although an agreement between the parties to pay a specified penalty on a breach of the promise was regarded as a *pactum turpe*, and, as such, was void, the party withdrawing did not, in the law of the Empire, escape scot-free, as he (or she) forfeited the *arrha* (or earnest) given at the time of the betrothal (Cod. 5, 1, 1, 5; *ibid.* 3, 4, 14; *ibid.* 5, 17, 2).¹

Among the Teutonic tribes, the bride-sale of which Tacitus speaks in the Germania (c. 18) was—as among the Hebrews and the Romans—much more than a mere sale. It was, as Sir F. Pollock and Professor Maitland point out (*Hist. of Eng. Law*), a sale not of a chattel, but “of the *mund*—the protectorship over the woman. An honourable position as her husband's consort and yoke-fellow was assured her by the solemn contract. This need not,” as these learned authors go on to add, “imply that the woman herself had any choice in the matter. . . . Though no doubt her kinsmen may make a profit out of the bargain, as fathers and feudal lords will in much later times, the more essential matter is that they should stipulate on her behalf for an honourable treatment as wife and widow.” If either of the parties to the contract in those early English betrothals refused to perform his part of it, they were to suffer a money penalty: if it was the

¹ Mr. J. C. Ledlie of the Privy Council Office, a well-known authority on Roman law, has sent me the following note on the subject: “There are, as usual, many debated points in regard to the subject of Breach of Promise in Roman law, but it is agreed that in the law of the later Republic and of the Empire a promise to marry (*sponsio*, *sponsalia*) was *not* actionable. It is also agreed that in the other Latin communities a promise to marry *was* actionable down to the lex Julia of 90 B.C., which extended the Roman *ius civile* to those communities. Whether such a promise was *ever* actionable in Rome is very doubtful. Ihering (*Geist des röm. Rechts*, ii. 223) is strongly of opinion that it was *not*, but many writers of great authority (e.g. Girard) hold otherwise. Ihering considers the non-actionability of a promise to marry to be a necessary consequence of the fundamental principle of Roman marriage law, viz. the absolute freedom of each party in the contracting as well as the dissolving of marriage. ‘In contrahendis nuptiis libera potestas esse debet,’ Codex, 5, i. 5, 6; ‘Pacta ne liceat divertere non valere constat.’ An actionable promise would, in Ihering's view, have been a clog on this freedom. During the earlier Republic it appears to have been open to the parties to stipulate for a penalty to be paid by the party breaking the promise, but in the later law such a stipulation was treated as *pactum turpe*, and could be met by *exceptio doli*. See Bryce, *Studies in History and Jurisprudence*, ii. pp. 393-4. The title of the Digest dealing with *sponsalia* is 23, 1, but nothing is there said about their non-actionability. The principal texts on the subject are Dig. 45, i. 135 pr. and Codex, 5, i. 1, and 8, 39, 2. Where (as was frequently the case) *arrha sponsalicia* had been given on the betrothal, a breach of the promise (in Justinian's law) involved forfeiture thereof, unless the engagement was broken off by mutual consent or for a *iusta causa* by one party only. But though *sponsalia* were not actionable, to enter into double *sponsalia*, i.e. to engage oneself to B while an engagement with A was still subsisting, involved *infamy*. The Canon Law on the subject was, of course, different.”

bridegroom who refused, he forfeited what he had paid by way of bride-price; if it was the parent who refused, he had to pay back the bride-price and one-third more with it. This was the rule of the early Church. But when the Church came to exercise exclusive jurisdiction in questions of marriage and had adopted the principle of the Civil Law *consensus facit nuptias*, it went a great deal further than this bare penalty. There were two kinds of betrothals or espousals recognised by the Canon Law—"sponsalia per verba de præsenti" and "sponsalia per verba de futuro, repromissio (*i.e.* reciproca promissio) futurarum nuptiarum," and of both of these the Ecclesiastical Courts decreed specific performance, but with a slight difference. In the case of espousals "per verba de præsenti," the parties were sentenced to celebrate the marriage "in facie ecclesiæ," and in default might be excommunicated and imprisoned on a writ *de excommunicato capiendo* until he or she submitted to obey the ordinary.

"But as for persons," says Swinburne, "who had contracted sponsals only *de futuro*, if either of them did refuse to perform their promise the judge was not to proceed to the significavit in chancery for an *excommunicato capiendo*, but to prevent further mischief by compelling them to go together which did hold one another: yet was not this froward party thus to be dismissed, but was to suffer penance for the breach of his promise; nor was he or she to be dismissed or absolved if those sponsals *de futuro* by reason of carnal knowledge or some other act equivalent did become matrimony. For in that case as in the former, where sponsals were contracted *de præsenti* the disobedient party was to be excommunicated, apprehended, and imprisoned, and not to be absolved or released before satisfaction or death or other just cause of divorce" (Sponsals 1, 17).

In both cases the foundation of the jurisdiction was the same. The parties by plighting their troth (*fides data*) had created an obligation cognisable if the Spiritual Courts, and enforceable by penance or excommunication (*ne fidem fallerunt*), and this "wholesome" discipline of the Church was not to be interfered with merely because such a marriage might not turn out a happy one. That was a secondary consideration. This ecclesiastical jurisdiction to compel a celebration of marriage was abolished in England in 1754 by Lord Hardwicke's Act (26 Geo. II. c. 33); but in the interval (1732) Chief Justice Raymond had delivered his important judgment in *Holt v. Ward* (2 Str. 937) fully recognising the right of action—even by an infant—for breach of promise of marriage, and the above Act expressly saves the right to claim damages for the breach of such a promise in an action on the case.

"Formerly," says the Chief Justice, "it was made a doubt by my Lord Vaughan whether any action could be maintained on mutual promises to marry, but that is now a point not to be disputed. And as to the present case we should have had no difficulty in giving judgment for plaintiff if we could have been satisfied by the argument of the civilians

that as the plaintiff was of the age of consent any remedy, though not by way of action for damages, could be had against her. But since they seem to have no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether the contract as against the plaintiff was absolutely void. And we are all of opinion that this contract is not void but only voidable at the election of the infant; and as to the person of full age, it absolutely binds. The contract of an infant is considered in law as different from the contract of all other persons. In some cases his contract shall bind him: such is the contract of an infant for necessaries, and the law allows him to make this contract as necessary to his preservation. . . . Where the contract may be for the benefit of the infant or to his prejudice, the Court so far protects him as to give him an opportunity to consider it when he comes of age, and it is good or voidable at his election.¹ But though the infant hath this privilege, yet the party with whom he contracteth hath not: he is bound at all events. And as marriage is looked upon as an advantageous contract and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant, we think that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts. And no dangerous consequences can follow from this determination, because our opinion protects the infant even more than if we rule the contract to be absolutely void. And as to persons of full age it leaves them where the law leaves them which grants them no protection against being drawn into inconvenient contracts."

This ruling of Lord Raymond is as true to-day as it was a hundred and eighty years ago, that the exchange^{*} of mutual promises to marry creates an actionable contract—an enforceable obligation.²

In thus holding we differ from nearly every European country, and the most curious thing about the difference is the reason of it. We in England have always been accustomed to plume ourselves on the freedom of choice which attaches in our country to marriage. Marriages, we say, are not "arranged"; inclination is not fettered. Yet by a strange irony it is on this very point on which we pique ourselves that we stand impeached. Foreign nations refuse to enforce a promise to marry or to recognise it as giving rise to an action for sentimental damages, and why? Not because "at lovers' perjuries they say Jove laughs," but because to do so would

¹ The Infants' Relief Act, 1879 (which applies to promises to marry by an infant—*Coxhead v. Mullis*, 3 C.P.D. 439), only further protects the infant by making such promise not merely voidable, but void.

² On May 6, 1879, the House of Commons on the motion of the late Lord Herschell—then Mr. Herschell—passed a resolution abolishing the action for breach of promise "except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to the amount of such pecuniary loss"; but the proposal has never got any further.

be to trench on the absolute freedom of choice which should prevail until the actual ceremony. As in Roman law, it is *pactum turpe*.

FRANCE.

Thus by the law of France all promises of marriage are invalid "comme portant atteinte à la liberté illimitée qui doit exister dans les mariages." But if special damage (*préjudice*) can be shown to have resulted from non-fulfilment of the promise, the amount of such damage can be recovered; as where the engagement has been announced, say, in the society papers, and the refusal to marry is calculated to injure reputation, or where "la grossesse de la fille" has resulted or expenses been incurred; but loss of the chance of an establishment is not a "préjudice," though that word has a wide signification, moral as well as legal. But in any case the damages are due *ex delicto*, not *ex contractu*.

PORTUGAL.

The Civil Code of Portugal of 1868 (Art. 1067) expresses it thus: The consent of the parties in view of marriage cannot be given irrevocably, but by the act of celebration only. Consequently, all engagements by which the parties purport, under the form of betrothal or in any other manner, to bind themselves by promises to contract marriage are null and void, and it makes no difference whether such engagements do or do not contain penalty clauses.

This Article will not, however, prevent a person who, in pursuance of a promise of marriage, has received gifts or authorised expenditure being compelled to make restitution of that which he or she has received or to pay an indemnity if the other party requires it.

SPAIN.

By the Spanish Code of 1889, promises of marriage do not carry with them an obligation to contract marriage. No tribunal will allow a person to claim performance (Art. 43).

If the promise has been made by public or private act by one *sui juris* or by a minor assisted by the person whose consent is necessary to the celebration of the marriage, or if the engagement has been announced, the one who refuses to marry without legitimate cause will be obliged to indemnify the other party against the damage resulting from the promise of marriage.

The action for damages must be brought within a year from the date of the refusal to celebrate the marriage.

HOLLAND.

Holland has the same rule against enforcing promises of marriage ; but when the official notification—the first step towards marriage—has been given, the publication of it will found a damage action.

Art. 113 of the Code (1886) runs as follows :

Les promesses de mariage ne donnent point d'action pour contraindre au mariage ni en dommages-intérêts s'il y a eu violation des promesses : toutes stipulations en dommages-intérêts de ce chef sont nulles.

Cependant lorsque la déclaration du mariage à l'officier de l'état civil aura été suivie d'une publication, il pourra y avoir lieu à une action en dommages-intérêts à raison des pertes réelles que l'une des parties aura faites par suite du refus de l'autre de contracter mariage : il ne sera pas tenu compte du gain dont elle aura été privée. Cette action se prescrit par dix-huit mois à dater de jour de la première publication.

GERMANY.

Germany deals very carefully with this subject in ss. 1297–1302 of its Civil Code. These sections in Mr. E. J. Schuster's English version run as follows :

Family Law : Betrothal.

1297.—No action can be brought upon a betrothal for the fulfilment of the promise to marry. A promise to pay a penalty in case of the non-fulfilment of the promise is void.

1298.—If a betrothed person withdraws from the betrothal, he or she shall compensate the other party to the betrothal, the latter's parents, and any third parties who have acted *in loco parentis*, for any damage caused by their having incurred outlay or obligations in expectation of the marriage. He shall also compensate the other party to the betrothal for any damage which the latter suffers through having in expectation of the marriage taken other measures affecting his or her property or employment.

The damage shall be made good only in so far as the incurring of outlay and obligations and the other measures were reasonable under the circumstances.

The duty to make compensation does not arise if a grave reason for the withdrawal exists. [The burden of proof is upon the defendant.]

1299.—If a betrothed person causes the withdrawal of the other party to the betrothal by any fault which constitutes a grave reason for the withdrawal, the former is bound to make compensation in accordance with 1298, pars. 1 and 2.

1300.—If a betrothed woman of unblemished character has permitted the other party to the betrothal to cohabit with her and if the conditions specified in 1298 or 1299 exist, she may also claim an equitable compensation in money on account of the injury which is not an injury to property. [*i.e.* Loss of virginity.]

The claim is not transferable and does not pass to his heirs, unless it has been acknowledged by contract or action has been commenced to recover it.

1301.—If the marriage is not concluded, either party to the betrothal may demand from the other the return of what he—or she—has given to the other as

a gift or as a token of the betrothal in accordance with the provisions relating to the return of unjustified benefits. In case of doubt, it is to be presumed that the claim for return is barred if the betrothal is dissolved by the death of one of the parties to the betrothal.

1302.—The claims specified in 1298–1301 are barred by prescription in two years after the dissolution of the betrothal.

THE SWISS CIVIL CODE, 1907.

This is the latest embodiment of legislative wisdom on the subject.

Des Fiançailles.

91.—La loi n'accorde pas d'action pour contraindre au mariage le fiancé qui s'y refuse.

L'exécution des peines conventionnelles qui auraient été stipulées ne peut être réclapée.

92.—Lorsqu'un des fiancés rompt les fiançailles sans de justes motifs, ou lorsqu'elles sont rompues par l'un ou l'autre à la suite d'un fait imputable à l'un d'eux, la partie en faute doit à l'autre, au parents ou aux tiers ayant agi en lieu et place de ces derniers, une indemnité équitable pour les dépenses faites de bonne foi en vue de mariage.

93.—Lorsque la rupture porte une grave atteinte aux intérêts personnels d'un fiancé sans qu'il y ait faute de sa part, le juge peut lui allouer une somme d'argent à titre de réparation morale si l'autre partie est en faute.

94.—Les fiancés peuvent, en cas de rupture, réclamer les présents qu'ils se sont faits.

95.—Les actions dérivant des fiançailles se prescrivent par un an à compter de la rupture.

To these "législations romaines," as a writer calls them, the Scandinavian peoples present a marked contrast, as illustrated in the Swedish Code. Betrothal in Sweden is a "demi-mariage." It is a formal ceremony which takes place in presence of the "giftoman" and four witnesses, two on each side. Starting from this view of betrothal—as a "demi-mariage"—the law treats those "qui se fiancent au mépris de fiançailles précédentes" as if they were guilty of "demi-bigamie," and punishes them by fine accordingly.

SWEDEN.

Chap. III.—Des Promesses de Mariage, ou Fiançailles.

1. Lorsque on veut faire des fiançailles ce doit être devant le giftoman et quatre témoins, deux du côté du futur mari et deux du côté de la future. Dans le cas contraire les fiançailles sont nulles si le giftoman en demande la nullité, et chacun de ceux qui se sont fiancés illégalement est puni d'une amende de dix dalers, qui sont attribués aux pauvres : il n'y aura pas d'amende si les fiançailles sont ratifiées par le giftoman.

2. Si l'on s'oblige par écrit à contracter mariage et si le giftoman y donne son adhésion, aucun des deux obligés n'aura le droit de rompre la promesse et de contracter un autre mariage.

3. Si un autre que le giftoman a consenti aux fiançailles . . . il sera puni d'une amende de quinze dalers et les fiançailles seront nulles.

4. Si le giftoman fiance une fille à plusieurs il paiera trente dalers.

5. Celui qui se fiance avec une femme qui l'a déjà été régulièrement avec un autre paiera quinze dalers et elle trente. Si tous les deux étaient déjà fiancés avec d'autres, chacun paiera trente dalers. Si ils ont ensemble un commerce charnel ils seront punis comme il est dit au Titre Pénal, et tout ce qu'ils se seront donné mutuellement sera confisqué au profit des pauvres. Celui qui se fiance deux fois paiera trente dalers; les premières fiançailles resteront valables quoique la seconde fiancée ait conçu de ses œuvres. Si la première fiancée ne veut pas se marier avec lui, il se mariera avec la seconde.

6. Si sans le savoir un homme contracte des fiançailles avec une femme fiancée déjà ou à l'inverse il ne sera pas puni et le coupable seul paiera trente dalers.

7. Si les deux fiancés sont également cause de la nullité des fiançailles tout ce qu'ils se seront donné mutuellement sera confisqué au profit des pauvres et chacun paiera une amende de vingt dalers.

9. Si la fiancée devient enceinte des œuvres du fiancé, celui-ci devra se marier avec elle que les fiançailles aient été faites sous ou sans conditions, et dans le premier cas que ces conditions aient été ou non remplies. Si le fiancé veut se soustraire au mariage et s'il persiste dans sa résistance, la fiancée sera déclarée sa femme légitime et aura sur ses biens les droits résultant du mariage.

SCOTLAND.

"A promise of marriage," says Erskine in his *Principles of the Law of Scotland*, "may by our law be safely resiled from so long as matters are entire." This statement of the law is not now correct (see Fraser H. & W., 2nd ed. p. 487), and Scotland must be grouped with those countries like England, the United States, Ceylon, etc., which recognise the "*repromissio futurarum nuptiarum*" as binding in law. If the "*sponsalia de futuro*" have been followed by copula on the faith of the promise, Scotch law goes further, and treats the promise—being perfected by consummation—as "*ipsum matrimonium*"; but under ordinary circumstances the only redress competent to the party adhering to the promise and wishing it fulfilled is an action for damages against the person refusing. At one time only patrimonial loss could be recovered in such an action, such as the purchase of wedding clothes or any similar expenses. It is now, however, settled that damages may be recovered not only for patrimonial pecuniary loss, but as solatium for the wrong done and, as stated in an old case, for the "loss of the market" (see Fraser H. & W. 2nd ed. p. 487).

CAPE COLONY.

Under modern Roman-Dutch law as illustrated in this Colony, betrothal involves a legal obligation to marry, the breach of which gives rise to an action of damages. Prior to 1838 the injured party had the option of claiming either damages or specific performance, but the latter remedy was abolished by the Marriage Order-in-Council of September 7, 1838.

CEYLON.

In Ceylon—where the Roman-Dutch common law also obtains—actions to enforce marriage were disallowed by Ordinance No. 6 of 1849, s. 30, but actions for damages were allowed to continue. By a subsequent Ordinance (No. 2 of 1895, s. 21) “no action shall lie for the recovery of damages for breach of promise of marriage unless such promise of marriage shall have been in writing.”

UNITED STATES.

The law here follows very closely that of England. “Though marriages, and promises to marry,” says Mr. Bishop (*Marriage and Divorce*), “are supposed to proceed from sentiment, and to be superior to pecuniary considerations, yet the law takes cognisance of them as things of money value. And it furnishes pecuniary redress for breaches of the agreement to marry. The complaining party is oftentimes the woman, but action lies equally by the man against her or jointly against her and the man to marry whom she broke her engagement.

General Conclusion.—To sum up the result of the survey. Specific performance of a promise to marry has become an anachronism, and has been generally abandoned as not conducive to happy unions. So far in the other direction has the pendulum swung that with the large majority of continental countries a promise of marriage creates no actionable right. The remedy is confined to special damage in the nature of tort flowing from the breach.

England, Scotland, the United States and modern Roman-Dutch law take a middle course. A promise of marriage without being specifically enforceable is still a valid contract, and the breach of it gives a cause of action. Nor does there seem any sufficient reason why it should not do so. It may be a good thing, as continental nations think, that a promise of marriage should not be irrevocable, that there should be a *locus pœnitentiæ*, but if a man changes his mind without just cause, why should he not pay for his fickleness? Is he to be a chartered libertine, free to trifle with the affections of the other sex, perhaps to blight their matrimonial prospects for life, and no Nemesis overtake him? If the action is being abused—brought for blackmailing purposes by a designing woman—the remedy is always in the jury’s hands. They can mark their disapproval by awarding what Lord Bramwell called “the contumelious farthing.”

THE EFFECT OF A PROMISE TO MARRY.

Apart from the actionability of a promise to marry, there is much of interest to be gathered from a comparative study in regard to what a promise to marry implies. Here in England, for instance, the contract is not one

uberrimæ fidei, that is, the parties are not bound to disclose—as in life assurance—everything which might reasonably affect the mind of the other party in entering into the contract. The lady does not warrant, for instance, what Cockburn C.J. called “the virginity of her affections,” that it is a case of first love, nor is she bound to confess that the luxuriant locks which her lover admires are only a wig, or her teeth false, or that she has run into debt; these are things the fiancé may be left to find out for himself. She is not even bound to disclose that she has been confined in a lunatic asylum shortly before the promise was made, if she was sane at the date of the promise (*Baker v. Cartwright*, 10 C.B. N.S. 124); nor need she tell her lover when she accepts his offer that she is already engaged to another man (*Beachey v. Brown*, E.B. & E. 796). It is only fair, however, to warn young ladies who may think of acting on this last decision that its correctness has been doubted by an eminent Scotch lawyer. In Roman law it involved “infamy,” see p. 157*n*. America adopts the same principle as to the obligation, or rather non-obligation, of candour. “When a man,” says an American judge (*Gring v. Larch*, 112 Pa. at p. 249), “enters into an engagement of marriage with a woman, he is presumed to have made himself acquainted with her appearance, her temper, her manners, her character, and other matters which are obvious to the understanding, and which can be ascertained in the social intercourse which usually accompanies courtship. If he changes his mind and refuses to marry her for a defect which is open to observation and which he might have ascertained before by reasonable care, it is no defence to an action for breach of promise of marriage.” In fact, the good old rule of *caveat emptor* applies. “Open to observation,” in the above citation, no doubt creates a difficulty, having regard to the resources of modern art: for as Sir Benjamin Backbite in *The School for Scandal* remarks of Mrs. Evergreen, “There’s no judging by her looks unless you could see her face!” Sir Thomas More, it may be remembered, dealing with marriages in *Utopia*, discusses this difficulty and solves it in his own Utopian fashion by what may be called a “private view” by discreet friends on both sides.

But this principle of the engaged parties taking one another with the risk of all their imperfections has its limits. If, for instance, after a man has made a promise of marriage he finds the woman is quite different from what he had reason to think her, that she has led an immodest life before the date of the promise, this goes to the root of the contract, and he may refuse to perform his promise (*Foulkes v. Sellway*, 3 Esp. 236; *Beachey v. Brown*, E.B. & E. 796; *Young v. Murphy*, 3 Bing. N.C. 54), but to justify his resiling in such a case she must be a woman of general bad character; it is not, *semble*, enough that she is a lady “with a past,” neither can the want of virtue be made a ground of defence to an action for breach of promise if the man knew of it when he promised. This is equally accepted in England and America (*Johnson v. Traves*, 33 Minn. 231).

By English law chastity and modest conduct *after* the promise is a condition subsequent (*Jones v. James*, 18 L.T. 243). Roman-Dutch law is more strict. Under it a promise to marry implies a warranty against past or future unchastity (Maasdorp's *Institutes*, pp. 12, 13); but this warranty does not arise in the case of a widow or where the loss of virginity is not due to any voluntary act of unchastity—such, say, as befell Tess of the D'Urbervilles. This, at least, is the view of Voet (23, 1, 14). Pothier in his *Traité du Contrat de Mariage*, ii. 1, 7, intimates a different opinion.

Conversely the lady may—in England—cancel her promise on account of the bad character of the man. "If," said Lord Ellenborough in *Leeds v. Cook* (4 Esp. 256) "the plaintiff has conducted himself in a brutal or violent manner and threatened to use her ill, a woman under such circumstances has a right to say that she will not commit her happiness to such keeping." But she must show that the man is a man of bad character. The accusation is not enough (per Gibbs C.J., *Badeley v. Mortlock*, 1 Holt 151). Mere rudeness—according to the law of Scotland—is not sufficient justification (Stoole, 1870, 8 M. 613).

Time.—A general promise to marry is, by English law, a promise to marry within a reasonable time (per Lord Ellenborough, *Potter v. Deboos*, 1 Stark. 82). If the promise is indefinite, the party to whom it is made may call upon the maker to perform it at any convenient time (*Atchison v. Baker*, 2 Peake N.P. 103). By Roman-Dutch law betrothal also involves an obligation to marry within a reasonable time, and an action for damages will even lie against the executor of a deceased promisor who has unduly delayed the fulfilment of his promise. This is not so by English law or American law (Bishop, M. & D. s. 194) or Scotch law (Fraser H. & W. i. s. 488). The contract is a personal one; but if special damage can be proved to have resulted from the breach, an action may lie against the executors of the deceased promisor (*Finlay v. Churney*, 20 Q.B.D. 494); or by the administrator of the deceased promisee (*Chamberlain v. Williamson*, 2 M. & S. 408), because the estate of the promisee, in such a case, would have been the richer but for the wrong.

A promise is sometimes made to marry on the happening of a certain event, e.g. the death of the promisor's father. Then the event must be awaited (*Cole v. Cottingham*, 8 Car. & P. 75), but even here if the promisor declares his intention never to fulfil his contract, the promisee may at once bring her action (*Frost v. Knight*, L.R. 7 Ex. 111; *Donoghue v. Marshall*, 32 L.T. 310). It is now settled after some judicial controversy that a promise by a married man to marry another woman when his present wife dies, is contrary to public policy and void (*Wilson v. Carnley*, *Spiers v. Hunt*, [1908] 1 K.B. 729). And the same rule obtains in America.

"To hold such a promise valid would be," as Lawrence C.J. of Illinois said (*Paddock v. Robinson*, 14 Amer. R. 112), "to introduce into social life a dangerous and immoral principle . . . only in the most corrupt conditions

of society could such agreements be tolerated as lawful. They are in themselves a violation of marital duty, and the persons who make them are morally unfaithful to the marriage tie."

Fitness for Marriage.—A promise to marry in Roman-Dutch law implies a warranty against any defect which is inconsistent with the objects of marriage, such as impotence or incapacity; and see Pothier's *Traité du Contrat de Mariage*, 21, 7, 60. It also implies a warranty against any infectious disease such as leprosy or syphilis, and by American law a man or woman making a marriage engagement is justified in presuming—in the absence of any notice to the contrary—that the other party is fit for marriage, and either party finding this not to be the case may break off the engagement (*Gring v. Larch*, 112 Pa. 244).

A more difficult question is whether a disqualification for marriage arising subsequently to the promise will entitle the promisor to break off the engagement. In *Atchison v. Baker* (2 N.P.C. 103) a widower of forty, in good health at the time, proposed marriage to a widow of the same age. Afterwards the widower developed an abscess in the breast: the widow refused to carry out the engagement, and the Court held that she was justified in doing so; but in a subsequent case (*Hall v. Wright*, E. B. & E. 746), where the promisor had fallen into a consumption and refused to fulfil his engagement on the ground that marriage would be dangerous to his health, a majority of the Court held that such a plea was no good defence to the action. This decision has been much criticised. It would not be followed in Scotland (Fraser H. & W. i. s. 219). Certainly the American rule on the subject seems preferable. "If either party should after the promise become by the act of God, and without fault on his own part, unfit for the relation of marriage, and is incapable of performing the duties incident thereto, then the law will excuse a non-compliance with the promise—the main part having become impossible of performance, the whole will be considered to be so" (Allen, 1882, 41 Amer. R. 444).

Change of Religion.—According to writers of authority, a change of faith by one of the engaged parties may justify the other in breaking off the engagement; if, for instance, a Christian turns Mahometan, or Jew, or Anabaptist, or even a Quaker; but this last proposition seems extravagant, though certainly the Rev. Sydney Smith did once in a fit of irresponsible frivolity, express a wish to "roast a Quaker"—"just one!"

MONEY-LENDERS IN INDIA.

[*Contributed by I. B. SEN, Esq.*]

HISTORY tells us that Edward the Confessor, having heard it said in the Court of the King of the Franks that usury was the root of all vice, made laws in England in the middle of the eleventh century by which all usurers were to be banished and all persons convicted of the crime of usury to be outlawed. Usury included all money-lending with a view to gain. It had been forbidden by two Northern Synods in 787 A.D. It was a thing unlawful under Canon Law. Now it became a crime in Christian England. William the Conqueror allowed the Jews to settle in England. They were forbidden by their personal law to lend upon usury to a brother Jew but not to a stranger. So the Jews practised money-lending in England and had for a time the monopoly of the trade—a monopoly that cost them dear. But before the expulsion of the Jews from England in 1290, the Christian in fact competed with the Jew in money-lending, the prohibition of the Church and the State notwithstanding. And from 1290, when the Jews were banished, till the middle of the seventeenth century, when Cromwell allowed them to return to England, money-lending was carried on in England in the absence of the Jew by the Christian laity and often by the clergy themselves. The Church went on denouncing money-lending as a sin and the State devised measures for its suppression—measures that were prompted as much by the ostensible desire to enforce the Christian ideal as by the less evident though more potent consideration of filling the treasury. Towards the end of his reign Henry VIII. passed a statute which aimed at stricter and more effective prohibition of money-lending by providing definite punishment for all loans, direct or indirect, that reserved interest higher than 10 per cent. per annum. There could be no mistake as to the object of the statute, which sought to root out usury by means of punishment not only of the lender as stated above, but also of the borrower in certain cases of indirect usury. The people perversely enough, and with the help of the legal profession of course, construed the statute to sanction usury not exceeding 10 per cent. per annum in its rate of interest. The omission of the statute to provide for punishment of a part of the unlawful acts of usury, namely, loans at not more than 10 per cent. per annum, was cited as proof that the statute sanctioned and legalised such loans. The religious zeal of the reign of Edward VI. gave rise to a new statute

which clearly stated that this interpretation was wrong and forbade in so many words the taking of any interest whatever upon any loan of money upon the penalty of forfeiture, imprisonment, and fine. But the people took little heed of the law. They went on evading the law lawfully when they could and unlawfully when necessary. Such of them as cared for justification of usury on principle found it in the continental theologian Calvin and in the continental jurist Molinæus. Then Queen Elizabeth's attention was drawn to this "detestable" sin "forbidden by the law of God." In 1571 she repealed the statute of Edward VI., revived the statute of Henry VIII. and supplied the omission in the latter by making loans at not more than 10 per cent. punishable but less severely than loans at above 10 per cent. were. Doubtful of success with the unaided strength of secular law, Queen Gloriana enlisted the service of a second knight and called in to her aid the corrections and punishments of ecclesiastical law. Indeed, Queen Gloriana seems to have been pleased with the achievements of her knights, for a quarter of a century later she made the statute perpetual. But the dragon, if it was one, was not slain. Early in the reign of James I. we find Bacon voicing the public opinion and defending usury apologetically on the ground that "there must be borrowing and lending" and that it cannot be "free," *i.e.* without profit, because "men are so hard of heart." And for the first time in the history of England the State gave up attempts upon the life of the supposed dragon. The statute 21 Jac. I. c. 17 was the first that proceeded upon recognition of the fact of money-lending and yet not against it. James I. had however to quiet the conscience of his bishops by declaring money-lending to be opposed to religion and conscience. He did by the same statute fix the maximum rate of interest at 8 per cent., which had been in point of fact, but against the law of the land, 10 per cent., from the time of Henry VIII. Driven from pillar to post, henceforth the State tried for two centuries and more to keep in its hand the power of fixing the rate of interest. The maximum rate of 8 per cent. fixed by James I. was within a quarter of a century reduced to 6 per cent. during the Cromwellian period. About sixty years later Queen Anne reduced it to 5 per cent. This gradual reduction of the maximum rate of interest was, so the statutes recited, due chiefly to foreign and in particular Dutch competition in the English money-market. Towards the close of the seventeenth century Sir William Petty and Locke showed the futility of this attempt on the part of the State to fix the rate of interest. But the English economists were divided in their opinion. As late as the close of the eighteenth century Adam Smith himself took no exception to a legal rate which in his opinion should be a very little above the lowest market rate. It was reserved for that dauntless iconoclast Jeremy Bentham to free England from this idol of the tribe by his defence of usury in 1787. And in 1854 in the reign of Queen Victoria all usury laws were repealed, leaving money-lending to be a lawful

occupation and the rate of interest to be fixed by contract between the lender and the borrower.

Whether at any very early stage of ancient Indian civilisation the Hindus tried to suppress money-lending altogether, is not known. The oldest record of Hindu law that has come down to our times contains no evidence of any attempt to root out money-lending from society. On the contrary we learn from Goutama that as early as 600 B.C., probably much earlier, money-lending was recognised by the Hindus as a lawful occupation. The problem before the Hindus at that early period was much the same as that enunciated by Bacon in the seventeenth century A.D., namely, how might "the tooth of usury be grinded that it bite not too much." They solved the problem by providing two remedies, both tried independently in Rome at two far removed periods. The first remedy was to fix the maximum rate of interest, as the Twelve Tables did in Rome in the fifth century B.C., and as England did from 1624 to 1854 A.D. Goutama laid down that all interest above the fixed rate of 15 per cent. per annum was illegal. The second remedy provided in Goutama was a check upon accumulation of interest. It is interesting to note that this latter remedy was also tried in Roman law in the sixth century A.D. when Justinian's Code would not allow any interest to be demanded beyond twice the principal. In Goutama the law is that "the principal can only be doubled by length of time after which interest ceases." In other words exigible interest must not exceed the principal in amount.

Some four centuries later we come to the Institutes of Manu, that wonderful product of far-sighted sagacity and short-sighted self-love, of rigorous discipline to realise most noble ideals and indulgent allowance for common human frailty. In Manu, as is well known, we find society classified into four principal castes, the highest being the sacerdotal or the Brahmana, the next in rank the military or the Kshatriya, and the next the commercial or the Vaishya. All the three, being entitled to spiritual re-birth in this life, were called the twice-born castes. The fourth caste was that of the once-born Shudra or the servant. In this society aristocracy was spiritual and intellectual. Rank depended upon spiritual and intellectual culture—and not upon "possession of dirt" as in the middle ages of Europe. And there was some provision for elevation of the members of a lower caste to a higher one and for degradation of those of the higher to a lower. The highest caste, the Brahmana, lived by teaching the Vedas, officiating at a sacrifice, and by the agreeable occupation of receiving presents from pure-handed donors. The occupation of the military caste was to bear arms. The lowest of the three twice-born castes, the Vaishya, had money-lending for its occupation besides trade, agriculture, and attendance on cattle. The occupation of the once-born Shudra was service for hire.

Now, at all normal times each class was to pursue its own occupation and the Vaishya alone could lend money, for, says Manu, "his own office

though defectively performed is preferable to that of another, though performed completely, for he who lives by the acts of another class immediately forfeits his own." It is remarkable how law-abiding the Hindus were even in that early period of the history of mankind. This strict rule of conduct was followed in those days as implicitly as the cabmen obey the outstretched arm of the policeman in the streets of London to-day.

In times of acute distress, however, the rigid rule was relaxed, and if a Brahmana or Kshatriya or Vaishya could not live by his proper occupation, he could take to the occupation of a caste lower than his own but not that of one higher. The main exceptions to this rule were that neither the priest nor the soldier could take to menial service for hire nor practise one of the four occupations of the commercial class, namely, money-lending, for Manu says "neither a priest nor a military man must receive interest on loans." The result was that according to the Code of Manu at all times, normal or abnormal, the Vaishya or the commercial class alone could practise money-lending lawfully.

We do not know whether at any earlier stage the Hindus were forbidden to lend money to their co-religionists or fellow-tribesmen. Judging from the evidence of their attitude towards money-lending, it would be nothing surprising if it were so. But certainly even at this early period of the Institutes of Manu, the Hindus had outgrown that doubtful and friction-producing virtue which we notice among the Jews, the ancient Romans, and the Mahomedans, namely, of not accepting interest from one's own tribe, caste, or fellow-believer. Not only was the Vaishya money-lender entitled to interest from a borrower of equal or inferior caste, but also from one of either of the two superior castes.

The two safeguards against the evils of usury that we noticed in Goutama were provided also by Manu, who fixed the maximum legal rate of interest for all ordinary cases and restricted the accumulation of interest. Here under the former head Manu lays down that with the security of pledge the maximum rate of interest was to be 15 per cent. per annum as in Goutama and without the security of pledge the maximum rate was to be "in proportion to the risk and in the direct order of the classes," *i.e.* 2 per cent. a month from a priest, 3 per cent. from a soldier, 4 per cent. from a merchant and 5 per cent. from a servile man or mechanic. This scale of interest does not conform to our modern notion of the risk attendant upon the occupation of a priest, soldier, merchant, or mechanic. But we must judge of the risk in the light of the conditions of life that prevailed at that far-off infancy of history. And we may also note that in ancient India of this period as in the Roman Empire of Justinian's time and in mediæval Europe under the later canonists they had class legislation and they considered the question of interest relatively to the class of society concerned. But Manu clearly saw the modern economist's doctrine of interest being the price of use of money and of the risk. We notice also

a movement towards the contractual rate of interest. Says Manu, "Whatever interest for price of the risk shall be settled (between the parties) by men well acquainted with sea-voyages or journeys by land, with times and with places, such interest shall have legal force." The advanced character of this system of law will be fully realised when we remember that money-lending was unlawful in England till A.D. 1624, that from 1624 to 1854 a legally fixed rate of interest was the only lawful one recognised by the English Courts, and that the free contractual rate was legalised in England within the memory of living persons.

The relaxation by Manu of the rules in times of distress was taken advantage of by the later law-givers in developing the law of money-lending. When we come to the later compilation of Yajnavalkya we find that in times of distress, but not in normal times, the lowest of the four castes, the Shudra, is allowed to lend money upon interest which in the days of Manu was the exclusive privilege of the next higher caste. This was a long step forward. The Shudra, though inferior in caste to the Vaishya, is allowed to practise the occupation of the higher caste, if he cannot subsist by his proper occupation of service for hire. The Brahmana, the highest caste, is also allowed to practise money-lending in times of distress. With those whose rights it enlarges, distress tends to become chronic.

"Who dares not stir by day, must walk by night ;
And have is have, however men do catch."

About the sixth century A.D. Vrihaspati allows the Brahmana, the highest caste, lawfully to carry on money-lending with the help of the law of agency, even in normal times. Vrihaspati says: "A twice-born man may practise money-lending, agriculture, and trade not conducted in person." We thus come to the stage in which as a matter of fact all the castes do lend money lawfully. Possession, originally not quite genteel, has grown, mellowed by age, into respectable ownership.

As to rate of interest, we noticed even in the time of Manu the movement towards legal recognition of the contractual rate. Later on Yajnavalkya amplifies the doctrine laid down by Manu and ordains that "all borrowers, who travel through vast forests, may pay 10 [per month], and such as traverse the ocean 20 in the 100 to lenders of all classes (according to circumstances), or whatever interest has been stipulated by them (as the price of the risk to the lender)."

The rule checking accumulation of interest, whereby interest exceeding the principal in amount could not be demanded, continued in force all along and has come down, as we shall see presently, to our own times under the name of "damdupat."

Before I take leave of the Hindu period, I should draw your attention to one feature of the adjective law bearing upon the subject. It is well known that in all ancient states—China, Babylon, Egypt, Greece, and

Rome—money-lending eventually led to enslavement of the defaulting insolvent debtor. Solon was forced to find a remedy for the evil in Athens, and in 594 B.C. by proclaiming a general “seisachtheia” or shaking off of burdens, for the first time introduced into Europe the laws of bankruptcy. More than five centuries later Julius Cæsar found it necessary in 48 B.C. to develop the Law of Bankruptcy in the Roman legal system. In the Code of Manu, however, this legal development is absent. We know that about 300 B.C. Megasthenes, a Greek ambassador who lived in Bengal for some years, noted with admiration the absence of slavery in India. But in Manu’s time slavery was certainly not unknown in India, though the Hindu law relating to slavery was elaborated at a later period. Even in Manu’s time a clear distinction was made between a servant and a slave, the latter being incapable of having wealth exclusively his own, for that belonged to his master. Though a defaulting debtor could be arrested and forced to repay the debt by personal labour provided he were not a Brahmana, and provided also he were not of a caste superior to that of the creditor, the defaulting debtor, according to Manu, did not become a slave. And Manu further laid down: “The sum lent to a person in distress can give rise to no interest because then such interest would be extortionate.” But neither this rule nor the combined effect of the two other remedies referred to before could or was intended to prevent the degeneration of repayment of debt by personal labour into enslavement of the debtor. Debt being a sin, money lent must be repaid by the debtor, and, in case of his death before repayment, by his sons and even grandsons provided the debt had not been incurred for an immoral purpose, and this though the sons and grandsons had received no assets from the deceased debtor. It is evident that discharge of the debtor on the ground of insolvency would be out of place in such a system.

India came under Mahomedan influence in the eleventh century A.D. A Mahomedan is forbidden by his religion to lend money upon interest to a Mahomedan. “They who devour usury shall not arise from the dead but as he who ariseth whom Satan hath infected by touch,” so says the Quoran. The doctors of Mahomedan law, however, say that interest may be taken from a hostile infidel. But, in fact, even between Mahomedans the injunction is evaded by legal fictions, the best known of which is *bai-bil-wufa*, or sale of the security by the borrower with a condition of re-purchase from the lender at a higher price—a fiction that was frequently resorted to in England in the fifteenth and sixteenth centuries. But openly Mahomedan Law has never recognised money-lending as lawful. As a matter of fact, Mahomedan money-lenders progressing with the time received interest from the faithful and the unfaithful alike in spite of the prohibition of the Quoran and the doctors. And the Mahomedan rulers of India did not interfere with the Hindu law of money-lending. That is how matters stood when the British period in India commenced in the latter half of

the eighteenth century. All classes of Hindus could and did practise money-lending under the sanction of their law. And the Mahomedans theoretically could not, but in practice did, lend money on interest. The English in England were then at the stage in which money-lending was permitted but subject to maximum legal rates of interest—a stage, as we have already seen, not in advance of that of the Hindus. So the English passed regulations in India to fix the rates of interest, and further to restrict the accumulation of interest by making the rule of “damdupat” generally applicable to all money loans outside the Presidency towns, whether by Hindus, Mahomedans, or others. These Regulations were passed between 1793 and 1827. We have already seen how the usury laws were repealed in England in 1854. The plausible doctrine of the fur-coat of Canada being unsuited for India does not appear to have grown up then. So in 1855 all laws in force relating to usury were repealed in India also, leaving the parties entirely free to make their own terms as to the rate of interest. But the conservatism of the English judges of the various High Courts in India has managed to keep alive one rule of ancient Hindu Law of Usury. To-day the only surviving relic of the remote past is the Hindu rule of “damdupat,” which still forbids the Hindus—Hindus only—of the two cities of Calcutta and Madras and of the whole of the Presidency of Bombay to demand at any one time from any Hindu debtor interest exceeding the principal in amount.

With the above exception and with the exception of the absence of compulsory registration of money-lenders in India, their legal position is the same in India as in England. I do not believe compulsory registration to be necessary in India. I never saw there the altruistic circular of some of the London money-lenders reading “Loans upon notes of hand. No security demanded. No inconvenient questions asked.” But though the West is more aggressive in its method than the East, “Will you walk into my parlour?”—the old invitation of the spider to the fly—is not unknown in the hospitable East. For that we have a sufficient legal remedy in the equitable rules as to fraudulent or unconscionable bargains. An administrative remedy in the shape of Co-operative Credit Societies has recently been borrowed from Germany upon which it is too early yet to pronounce judgment. It is needless to add that slavery—unmasked slavery—is there no more. And the unlucky borrower can, when necessary, get himself white-washed by the laws of insolvency upon the usual terms. In India, with a population of nearly 295 millions, there are about 420,000 money-lenders and bankers, of whom, it is interesting to note, 17·4 per cent. are women. Of these 420,000 11 per cent. carry on their business in cities. The Mahomedan money-lender is not rare. He openly receives interest from the faithful and the unfaithful without troubling seriously about his resurrection. To borrow the words of Shylock, he knows “the way to thrive and he is blest.” I have also come across Mahomedans who, as late as 1904, found it necessary to resort to the legal fiction of

bai-bil-wufo and seek to establish the apparent character of sale by hiding its real character of mortgage in order that they might take with an easy conscience and an untarnished social name interest on money lent even to hostile infidels, who in this case were the sons of a deceased British colonel. And there are thousands of venerable Mahomedans whose ideas are somewhat out of date but who religiously follow the Prophet's precept regardless of their material interest. The Hindus, as might be expected from the history I have sketched out, have no such prejudice against receiving interest. In fact, as the Indian saying goes, "cream is sweeter than milk, grandson than the son, interest than the principal." But it will not be difficult to find to-day many thousand Hindus who still look down upon money-lending and will not receive interest from a brother-man. But not only is money now borrowed to be used as capital, but the debtors are now very often artificial persons, *e.g.* the State, municipal corporations, companies. When the debtor happens to be an impersonal person—if I may use such an expression—there is no occasion for sentiment in the creditor and he does not hesitate to receive interest from such artificial or juristic person. At this stage one hesitates to receive interest from Lord Morley, but not in the least from the Government of India. Not long afterwards one sees the anomaly of this attitude of mind and takes up the more logical position. I have not seen this stage of illogical attitude and practice noted in any account of the gradual improvement of the attitude of the English society towards money-lending. I cannot, therefore, say if the above remarks apply to the English, though I have reasons to believe they passed through such a stage at one time. But I know of this illogical intermediate stage among the Hindus. Gradually the irrational sentiment disappears and interest is received without hesitation from a brother-man. Charity ends and fairness begins. That has been going on in India under the present altered economic conditions.

In the big towns, which are few, a large portion of the borrowing is to supply capital for commercial purposes. In the rural parts a large portion of the borrowing is to supply capital for agricultural purposes, secured often by mortgage even of future crops. But in both the places quite a considerable portion of the borrowed money goes to meet private as opposed to commercial and agricultural demands upon the debtor's purse. A large number of persons are affected by such loans. I do not feel sure how far law could keep them out of debt. Education of the masses, teaching them to take care of themselves, appears to me the only sure remedy for this evil—far surer than the primitive remedy of the patriarchal days which sought to keep one portion of the people under perpetual tutelage by keeping another portion under constant ineffectual chastisement. But the Anglo-Indian administrator, liable to a common human frailty, is most reluctant to part with the rôle of the patriarch. And the Government of India has no money to spare for mass education.

In the meantime the evils of usury are partially kept down by the laws of insolvency to which the people are by their national tradition averse, by competition among money-lenders themselves and by the equitable rules as to unconscionable bargains.

A few words about the ubiquitous class of money-lenders in India known popularly as the Marwari. Without a reference to him a paper on the subject would be incomplete. He is a Jaina or a Hindu from Rajputana or the Punjab. He is to be seen everywhere in India, even in the remotest and unhealthiest village. He still evinces a sort of contempt for Western education and Western ways. A born business man and book-keeper, law-abiding almost to a fault, more abstemious than the proverbially abstemious Hindu, adventurous and industrious, a persevering fatalist, he is almost invariably successful in all his undertakings. He is the Jew of India. He usually combines the business of a retail miscellaneous tradesman with that of a money-lender. The unthrifty among the local people dislike him because he lends them money upon terms to which they agree and sells them goods on credit which they themselves ask for. He keeps away from the Criminal Court but is often to be seen in the Civil Court.

To conclude. Is it not remarkable how strikingly similar is the progress of the human mind and march of the human institutions in the East and in the West? If one will only read between the lines, one cannot help noticing how amid the seeming variations, which are non-essential, there is the essential unity of a movement towards the Golden Age that awaits alike the East and the West in the future. The East and the West have been converging towards the Golden Age before them, not diverging from a golden age behind them. True, in the East as in the West the progress has at intervals been through narrow passes and over steep heights; even these impediments were useful though they made the progress slow. The points of essential resemblance, I repeat, have always been far more numerous than those of non-essential difference. And that was in the days when the East and the West knew not each other and each thought that Goshen was in its own land and in particular in its own tribe. Now that time and space have shrunk and the barrier of languages can be easily scaled, does it become economists and votaries of Science to circumscribe their vision by artificial limits of a supposed "occidental commonwealth"? I confidently believe that the West will again seek for inspiration, not in the transitory Kipling but in the immortal Goethe—that the West will again sing not "East shall be East and West shall be West," but

"God's is the Orient,
God's is the Occident."

A GERMAN VIEW OF ENGLISH LAW.¹

[Contributed by JAMES EDWARD HOGG, ESQ.]

DR. GERLAND has recently published a book consisting of over 1,000 pages on the subject of the English Judicial System, and the value of this work from the point of view of comparative law is considerable. The author claims to have given a complete account of all the various tribunals, as they now exist, which go to make up the judicial system of England. Scotland, Ireland, the Channel Islands, and of course the oversea dominions are outside the scope of the work. As a matter of fact a good deal more has been included than an English writer would think necessary to justify the title of the book, for among "Courts" public offices like the Land Registry, Middlesex and Yorkshire Registries, etc., are dealt with. There are two main parts of unequal length, the first devoted to the Courts and their Organisation, the second (of little more than 100 pages) devoted to what are styled the remaining organs of the judicial system. Part II. deals with the laying of informations and complaints, the legal profession, and the functions of the Home Office and Parliament in the administration of justice. Part I. has two divisions, of which the second relates to the *personnel* of the judges and officials of the Courts. It is the first division of Part I. (consisting of nearly 800 pages) which contains the matter of principal interest, and is concerned with the Courts themselves. There are three heads. Under the first head come the ordinary Courts, inferior and superior. Under the second head come Courts and tribunals of "voluntary" jurisdiction (such as the land and deeds registries, Patent Office, Charity Commissioners, etc.), "special" Courts (such as the Railway and Canal Commission, military Courts and spiritual Courts), "local" Courts (such as the London Courts, Palatine Courts of Lancaster and Durham, University Courts of Oxford and Cambridge, etc.), and lastly what are called "Arbitration Courts"—including arbitration in general under the Arbitration Act, 1889. The third head deals with the relations between the different Courts, by way of appeal and as regards the authority of cases decided by them.

This summary shows that a wide survey of our system of administering

¹ *Die Englische Gerichtsverfassung.* Von Dr. Heinrich B. Gerland. (G. J. Göschen'sche Verlagshandlung, Leipzig, 1910.)

justice has been taken. What historical matter there is is interesting, and there is little to complain of in the way of omission. The Isle of Man and India should have been included (on p. 282) among the dominions whose appeals go to the Privy Council, but a full account of colonial appeals does not fall within the scope of the work.

The professed object of Dr. Gerland's book is to present a view of our English system to German readers, in order, as he says in his preface, to help on the scientific study of jurisprudence on the Continent by filling the considerable gap that continental jurists have found to exist in the materials available for their study of English law and administration of justice.

The interest of the book for English readers is, of course, an interest of another kind. Incidentally a good deal of valuable material has been gathered together—some of it from out-of-the-way places—which is even more useful to English than to German lawyers. The principal reason for the book appealing to English lawyers is that the independent account and criticisms of our institutions by a foreign author draws our attention to features in our law—both its theory and practice—that are otherwise forgotten or overlooked. Only by having the peculiarities of our own legal system emphatically brought under our notice, and by being thus compelled to institute comparisons between our own and other people's systems of jurisprudence, is any substantial advance to be secured in the direction of making our own system more scientific and therefore more useful from a strictly practical and utilitarian standpoint. It has been well said of lawyers—and the remark applies to English lawyers in particular—that they are in danger of forgetting that the law is made for man, and not man for the law. Dr. Gerland criticises our English jurisprudence freely and sometimes severely. If we cannot agree with him altogether, we cannot help admitting that improvement is much needed, and is by no means impossible to effect.

One of the peculiar features of English law is the extreme difficulty, as compared with continental systems, of ascertaining its rules and principles and of understanding them sufficiently for practical application. Not only is this stated pretty plainly by Dr. Gerland, but it is obviously the fact apart from his direct statements. This difficulty is referred to in the preface, and appears incidentally throughout the body of the book. "The labyrinths of the English common law and statute law" are feelingly recalled in the preface, and on p. 772 some hard knocks are dealt in the course of a criticism of our "patchwork" of case law. But the difficulty of grasping some of the leading conceptions of English law is even more clearly shown in the handling of parts of the discussions on the meaning of particular developments. Thus, the significance of the reform effected in 1875 by the Judicature Acts is discussed at p. 297 *et seq.* The conclusion reached is that the essential feature of the reform, that in which lies its peculiar significance, is the abrogation of the distinction and opposition between

law and equity. Now it is no doubt to be expected that some day the rules of law and the rules of equity will cease to be distinguished in virtue of their different origin, and will simply be rules of jurisprudence administered by the Courts without specific reference to their origin. But that time has not yet arrived, and the only "fusion" that can so far be said to be completely effected is simply a fusion of administration—the rules both of common law and of equity being administered by the same Court. The very ability with which this subject is discussed by Dr. Gerland only sets in a clearer light the inherent difficulty he has in grasping the English distinction between law and equity. The difficulty of ascertaining and understanding English law is further shown by this fact: Dr. Gerland has made use of many summaries and expositions produced by English writers, and has thereby been saved the enormous labour of going back in every instance to the original authorities; nevertheless, he complains of the intricacy and obscurity of our law.

Another feature of English law is its relative failure to secure the boon of prompt, inexpensive, and satisfactory litigation with respect to commercial business. Dr. Gerland lays great stress on this, and returns to the charge again and again, insisting that commercial business shuns the Courts, and that the English judicial system is quite behind the times in providing facilities for the expeditious settlement of business disputes.

Naturally the question of the possibility of reforming the English system—both as to substantive jurisprudence and the administration of justice by the Courts—is touched on by Dr. Gerland. With respect to the administration of justice by the Courts, the circuit system meets with his unqualified disapproval. A good deal of current literature on this subject is referred to, and the conclusion arrived at is that the days of the circuit system as it now exists are numbered; moreover, reform of the circuit system means reform of the whole judicial system (pp. 608, 609). The remedy for the waste of judicial power and time that at present goes on under the circuit system probably lies in the direction of decentralisation. If permanent Courts of the standing of the High Court and the Court of Appeal were established throughout the country, instead of in London only, a comparatively small increase in the judicial staff would effect an enormous saving in the time, money, and worry now expended on litigation and general legal business.

With respect to reforms other than those of mere procedure and administration of justice, Dr. Gerland thinks our system of case law shocking. Bad as it undoubtedly is from the point of view of really scientific law, and responsible as it is for many subsidiary defects in our whole system of jurisprudence practical and theoretical, this part of the criticism on English law and practice will commend itself to English readers less than any other of Dr. Gerland's strictures. It is possible, indeed, on this point to criticise the critic effectively on a definite matter of principle. Discussing

the whole question of law made by precedent, or judge-made law, Dr. Gerland ridicules the notion of mere precedent making law, and says with some rhetorical effect for the moment that English law will remain in its present backward state of development so long as "the later judge is bound by the decision of the earlier" (p. 771). Now there is one fundamental difference between the English and continental systems of jurisprudence which goes far to deprive this scorn of precedent of its justification. The difference alluded to is one that is constantly noticed throughout the book, and is this: many officials on the Continent bear the name and exercise the functions of a "judge" which in England belong to officials who, whatever their judicial functions, are not in England styled "judges" or given the consideration due to a judge. Persons whom we call in England masters, registrars, even arbitrators, are all classed in Germany as "judges." Consequently "judge"-made law may seem to a German rather a poor thing. Further, continental writers do not always take into account the broad distinction between judges of the superior Courts and judges of the inferior Courts. The decisions of County Court judges emphatically do not make law. The decisions of High Court judges may very well do so. The elevated and honourable position of our judges of the superior Courts is referred to more than once by Dr. Gerland, who, in fact, points out with great acuteness that any sensible increase in their number would tend to diminish the weight of their authority. The importance of the circumstance that it is only judges of the superior Courts who can be said to create law by means of precedents seems to have been overlooked in this connection.

All this notwithstanding, Dr. Gerland's remarks on the obstacles that English case law presents to codification are extremely interesting and valuable. But here again he might have admitted what has been noticed by more than one English writer—that we in England are proceeding, though slowly, towards codification, whilst on the other hand the continental systems are more and more attaching importance to precedent, and allowing their judges to be bound by the decided case.

In conclusion, Dr. Gerland's work is a notable book and well worthy of perusal by English lawyers.

SOME NOTES ON EAST AFRICAN NATIVE LAWS AND CUSTOMS.¹

A FURTHER collection of these fast vanishing native customs will, the Editors are sure, be acceptable to readers of the Journal.

The fundamental ideas amongst most of the native tribes in East Africa regarding questions of family relationship are :

- (1) That individual members of a family form the wealth and strength of the united family ;
- (2) That females cannot inherit and cannot dispose of property ;
- (3) That females are themselves property to be bought and sold in marriage, to be assigned in payment of debt, and to be owned and inherited by their male relations.

In fact, the female members of a man's family are as much a part of his property as his cattle, and often the most important source of his income.

Given this conception of society in the minds of primitive savages, whose crimes are commonly the instinctive crimes of passion, it naturally follows that such offences as murder and rape are regarded by them in a very different light from that in which they present themselves to our eyes. Murder is regarded as a loss of strength caused to the family of the person murdered, which may be compensated by the murderer replacing the murdered man with others. Rape of an unmarried woman is regarded as so much loss caused to her owner in the price procurable for her in the marriage market, which may properly be compensated by damages.

In short, these offences which we consider as offences against the person, are regarded equally by the natives as offences against property.

The idea common to civilised nations of a crime such as murder being an offence against society and of such fictions as the "King's Peace," has no place in the native mind.

Thus, a native whose unmarried daughter has been raped considers that justice is incomplete if the perpetrator of the deed, in addition to any other punishment he may be awarded, is not compelled also to refund him damages for the pecuniary loss he himself has suffered.

These instances are referred to more particularly to show how essential to any effort to administer substantial justice to the natives is the possession of some knowledge, not only of their customs, but of their manner of regarding the main features of social life.

¹ Reprinted from East Africa Protectorate Reports, vol. i., compiled by Mr. Justice Hamilton.

The valuable provisions of Article 20 of the Order-in-Council of 1902 are not to be misconstrued into an authority for administering justice to natives in the "rough-and-ready" style, of which some affect to think highly, but which is generally but the sign of a lack of experience or of sympathy and patience, and not infrequently results in what is in reality rough-and-ready injustice.¹

Every judicial decision where natives are concerned is a stone in the foundation of Government, and in order to be in a position to give a right decision it is above all things necessary that the judge should get to the real kernel of the matter, though at first sight it may appear to him to be incomprehensible, trivial, or even ridiculous.

Where values are quoted in the following pages it must be remembered that they are liable to fluctuation—according to the wealth of the tribe and the general prosperity depending on the seasons. Rupee currency is gradually taking the place of cattle or goats for the expression of terms of value.

WANYIKA.

This is a generic term for a number of more or less allied tribes inhabiting the Nyika country between the coast and the Taru Desert, and includes the—

Wagiriama,
Wadigo,
Waduruma,
Wa Rabai,
Wa Ribe,
Wa Kambe,
Wa Jibana,
Wa Chonyi,

Wa Segeju (of separate origin, but intermarried).

Their customs are in the main similar but with one or two slight differences, which will be pointed out.

The penalty for murder is that from two to ten persons of the murderer's family be taken and given to the family of the murdered person. In default of this the murderer himself must be handed over to be put to death.

The persons so handed over appear to occupy a somewhat menial position, but being essentially "strengtheners of the family" are not regarded

¹ Art. 20, O-in-C. 1902: "In all cases civil and criminal to which natives are parties every Court (a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any O.-in-C. or Ordinance; and (b) shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

as slaves. This is certainly the case with the Wadigo, and probably with most other Nyika tribes. Boys handed over in the above manner among the Wadigo are on coming of age permitted to return home, but not so girls.

The Wadigo draw a distinction between a murder committed in the heat of passion and in cold blood, the number of persons demanded in the latter case being four times that in the former. In later years blood money has been reckoned at 100 joras of *americani*.

Other offences are punished by fines.

There is no limit to the number of wives a man may have; they are obtained by payment of a sum agreed with the woman's father or guardian. The contract is generally made when the girl is about eight years old.

The marriage price is security for the woman's good behaviour, and a divorce can always be arranged on terms of its repayment; and in the event of the death of the woman's father or guardian, it is recoverable from their respective heirs.

The eldest surviving brother of a deceased man is his sole heir, but he is burdened with the duty of providing a home for the deceased's widows and children. It is from the prices paid on the marriage of the daughters and re-marriage of the widows that their guardian benefits out of the inheritance.

Where there are no surviving brothers, the eldest son inherits, then the other sons in turn, then nephews and grandsons in turn, but all under the obligation of providing for the deceased's widows and children. If the children are young a cousin takes. If the eldest surviving brother of the deceased be younger than the sons, he inherits the wives and daughters only, other property being equally divided between the sons.

Amongst the Wa Rabai, if the eldest son be married, he inherits as sole heir and can make what arrangements he likes on behalf of his brothers.

In practice it frequently happens that the deceased's surviving brothers divide his widows and unmarried daughters between them.

In the event of there being no person so entitled by custom capable of inheriting, the widows and unmarried daughters are taken charge of by the nearest male relative of their respective mothers.

Ascendants never inherit, and females only in the case where there is no male collateral or descendant.

The Wadigo differ from all other Nyika tribes in this respect, that inheritance is traced in the first place through the deceased's sisters, and not his brothers. The heirs are the children of the deceased's sisters, which in practice resolves itself into the strongest nephew.¹

Where there are no nephews by a sister, the inheritance goes to the

¹ In the case of an Mduruma or Mdigo who has become a convert to Islam, or "Haji," his children go on his death to the eldest brother of their respective mothers.

family of deceased's mother, and failing them, first to sons and then to grandsons of his maternal aunts.

An Mdigo father in like manner has no right of disposing of his own daughters in marriage, who are disposed of by his mother's brother.

All land is considered to belong to God, and cannot therefore be bought and sold, but trees and crops may be. An occupier's right depends on his cultivation of the land.

In the case of robbing from a plantation by night, the owner is justified, if he cannot recognise the thief, in shooting at and killing him, but not if he is able to identify him.

WAGIRIAMA—the most important Nyika tribe.

Habitat.—Coast strip from Rabai N. to the Tana River.

In the event of murder, the murderer is bound to pay to the family of the deceased two persons (generally children) to take the murdered man's place.

Should a man murder his own brother or father, the penalty is to pay one person only.

Should a man murder his own wife or child there is no penalty, as the murderer has in this case committed an offence against himself only, and destroyed his own property.

A marriage contract is made between the intending husband and the girl's father, and requires in theory the girl's consent; though this consent may be necessary if the girl is of full age, it would not appear to be so in cases where the girl is betrothed when still a child, as there is no provision for her repudiating the contract on arrival at maturity.

The price fixed for the bride is known as "mahunda," and is paid by the bridegroom's father, as no Mgiriana is capable of holding property till after his marriage.

The price varies according to the wealth of the parties.

This "mahunda" remains as a debt to be repaid the bridegroom's father, and is liquidated by the married couple either returning to his village and working for him or by their giving him a daughter.

When a marriage contract is made for a girl before she attains puberty, she remains with her parents till she attains puberty.

This does not appear, however, to be always the rule, for in many instances the child passes to the bridegroom's parents and is kept by them till she becomes marriageable.

When divorce is granted on account of the misconduct of the woman, she is returned to her father's house, but the father-in-law, or should he be dead his heirs, must in that case refund the "mahunda."

Should a woman leave her husband and not return to her father's house but go elsewhere, the man with whom she goes to live is liable to pay the amount of the "mahunda" as compensation to the first husband.

Wives are inherited by the deceased's brothers, and failing them by his nearest collateral male relatives.

Other property is inherited by the eldest son with an implied trust for the benefit of his brothers equally. Where, however, a particular shamba has been worked by one of deceased's wives, it is inherited by her own sons to the exclusion of step-sons.

A woman cannot inherit property.

Custom permitted of debts being paid with infant females.¹

The binding form of oath is to swear by the hyena.²

GALLA.

Habitat.—N. of the Tama River, behind the Lamu Archipelago.

As the *lex talionis* obtains amongst this tribe in a primitive form, blood can only be wiped out with blood. This not infrequently leads to lengthy vendettas which descend from father to son, and one murder leads to many deaths. Manslaughter not amounting to murder may be forgiven.

In cases of rape or adultery the offender may be publicly thrashed by the offended father or husband.

The penalty for theft is by the thief being ordered to make restitution of a property of a greater value than the article stolen; minor offences are punished with fines; and there is also a punishment of public cursing or excommunication which is resorted to in some cases to bring a backslider to reason.

Marriage is a matter of arrangement, the price paid for a wife going to her father, and the marriage tie is considered indissoluble.

On a man's death his wives are inherited by the brother of deceased, and failing brothers by his next of kin. Other property goes to the eldest son.

The Gallas hold slaves, and though a slave cannot own property he may be freed and adopted as a son by his master.

The form of oath considered binding by a Galla is by a spear.

WABONI.

These people are also known as Wasanya and Wat. They are a hunting tribe, living between the coast strip and the desert from the Galla country in the north to the Kilifi Creek in the south.

In the case of murder the murderer is handed over to the family of the murdered person to be dealt with.

Should the death have been caused by accident, the person who caused it is bound to produce another person to fill the place of the dead man.

Marriage is arranged by purchase.

¹ This is a custom to which the Courts would not give effect, as being essentially opposed to morality.

² Cf. note, p. 195.

The property of the deceased goes in the first place to his children, and failing them to his brothers.

The Waboni swear by stepping over the tail of a wild animal or a spear, with the invocation, "May this animal," or this spear, "kill me if I do not tell the truth." ¹

WATEITA.

Habitat.—Teita Hills, near Voi.

Murder is punished among the Wateita on much the same principle as obtains among the surrounding tribes, but a difference in degree is recognised according to the manner in which the death was caused. The place of the man murdered must be filled by another, or compensation paid, in cattle; in default of either of these methods of compensation the murderer is handed over or put to death. If the death has been caused by beating with a club the compensation is reckoned at ten goats and a bullock; if by wounding with a knife, sword, or arrow, at one girl, a hundred goats and a hundred head of cattle; if by poison administered internally the murderer is compelled to take the same poison.

In the case of accidental homicide the compensation payable is one child, or two head of cattle and five goats.

Other offences are punished by fines, of which one-half go to the elders and one-half to the party injured, *e.g.* :

Assault : fine	.	.	.	.	.	one bullock.
Rape	„	.	.	.	.	two bullocks.
Adultery	„	.	.	.	.	four goats.

A thief is bound to make restitution of the stolen article, and also to give a present to the elders.

Marriage is arranged by a purchase, but in the case of a man dying and leaving widows, a somewhat unusual custom is observed.

The widows are not at liberty to leave the deceased's village, but are allowed to marry any one they please. A man who marries a widow is bound to support her family, and in the event of her death he goes away leaving in the family any offspring that he may have had by her.

Widows have also the further privilege of being allowed to inherit a share in any of the miscellaneous property other than live stock of which their husbands may have died possessed.

Live stock and daughters are divided equally between the sons, and should the numbers not be such as to permit of an equal division the share of the youngest son suffers.

An occupation right to land is recognised, but should a man leave the land formerly occupied by him uncultivated for a season this right lapses.

¹ Cf. note, p. 195.

WATAVETA.

These people, who live on the eastern slopes of Kilimanjaro, show certain marked differences in their customs from those of the Bantu East African tribes, owing to the Masai influence.

The tribe is divided into degrees of rank, each degree being composed of members of a like age.

A custom in the nature of polyandry prevails, and it is usual for a man to lend his wives to his comrades of the same age-rank as himself.

Should a man, however, commit adultery with another man's wife without his consent, he is punished by fine and compensation, the amount varying in an increasing or diminishing degree according as the adulterer is above or below the age-rank of the husband.

The *lex talionis* is the old law of punishment for an offence against the person, but the due penalty may be compounded by payment of compensation in cattle.

Murder may be compensated by payment of thirty goats, six oxen, or three cows, with a fine of one ox, which goes to the elders. Payment of the compensation may be made by instalments and spread over a term of years.

Should a man cause another to lose a limb or an eye he is bound thereafter to contribute a goat to every public feast.

Theft is punished by the thief being compelled to refund the thing stolen and to pay five times its value, or to permit the person robbed to take anything he likes from him.

Marriage is arranged by purchase, and, as naturally follows in a society where polyandry prevails, divorce is not granted for adultery.

Divorce can, however, always be arranged by the woman getting some one to pay back to her husband the price originally paid for her. The husband can, with the consent of the elders, put away his wife if she refuses to work or causes him trouble by her ill conduct; in which case, if she has born no children, her relatives must return the price paid for her. If she has born a child only one-half of the price is returned, and if she has born two or more nothing remains to be returned.

On death a man's property passes to his sons, the eldest son taking the largest share; his widows go to his eldest surviving brother or should no brother survive him to his eldest surviving paternal cousin, who also acts as guardian of the other property if the sons are too young to look after it.

Should a man die leaving no son or near relations, the elders take charge. A woman cannot inherit, but should deceased leave no sons it is usual to give a small plot of land to his daughters, which on their marriage becomes the property of their husband.

Ownership of forest land is recognised, and the different members of a family each own their separate plot.

Strangers may obtain permission to hold land, for which they pay a rent to the owner.

MASAI.

A tribe of nomads, the Masai, with their flocks and herds, stretch from Kilimanjaro across the plains and up the Rift Valley to the northern plateaux of the Protectorate. They do not till the soil and their wealth consists in their stock.

Murder is atoned for by the payment of heavy compensation to the relatives of the murdered man, amounting to as much as a hundred head of cattle ; in the case of a boy being murdered the compensation is about half.

Should a moran (warrior) hear a moru (elder) cursing him he may kill the moru but must pay blood money of twelve cows to the murdered elder's relatives.

Intentional injury resulting in a broken bone is compensated by payment of one heifer. If the lobe of the ear be torn the compensation is one young ewe.

In the event of death or injury being caused unintentionally the elders settle what amount of compensation may be properly paid.

Theft of cattle, goats, or sheep is punished by the thief making restitution of twice the number of the stock stolen.

This rule applies to each person engaged in the theft.

If a thief on being caught admits the offence the fine is reduced.

A warrior on obtaining permission from the elders to marry after ten to fifteen years' service purchases his bride from her nearest male relative.

Divorce is practically unknown, but a wife in fear of her husband may take refuge in the house of a man of her husband's age and rank.

If a woman, however, voluntarily leaves her husband and goes back to her relatives, the marriage payment must be returned to him.

Should a warrior or boy commit adultery with a woman of his father's age-rank, he is liable to be cursed and to pay a fine of two oxen to have the curse removed. Adultery committed by a man with a woman of his own age-rank is no offence.

If an unmarried girl has had a child, the man who is in treaty for her in marriage may call on the father of the child to pay the marriage fee, and may take her to wife and adopt the child.

But it is permissible to procure abortion of a child conceived out of wedlock or to club it to death when born.

Incest with a daughter or one of her age-rank is punished by the other elders pulling down the offender's kraal and taking toll of his cattle.

Theoretically all the property of a deceased elder belongs to his eldest male child. But in practice he divides the greater portion of his cattle among his wives. On his death his wives give these cattle to their respective sons. But the eldest son takes the stock belonging to the childless widows. Should the eldest son be incompetent his brothers may make election of another brother to take his place.

If a man dies childless, his cattle go to his brothers and his widows to his half-brothers on the paternal side.

Should a widow afterwards have a son by a half-brother of the deceased or by another man, this son is given the cattle which he would have inherited had his mother's first husband not died, being regarded as a member of the deceased's family.

The property of minors is taken care of for them till they grow up.

A man may not inherit the property of his maternal uncle.

Land is frequently named after the section of the tribe that first used it as a grazing ground, or is for the time being occupying it. But individual rights to land as distinguished from tribal rights to land are not recognised.

If a speaker's veracity is challenged, if a man he swears "By my sister's garment," if a woman, "By my father's garment."¹

NOTE.—The Masai form is "N-gilani e-n-gerai o-l-poror lang" or "N-gilani e-n-gerai ai." This is used by men only. (Hollis.)

BANTU KAVIRONDO.

Habitat.—The slopes and valleys N.E. of Lake Victoria.

Marriage is arranged with the parents of the bride, while she is still a young girl, and the suitor pays them the agreed price by a succession of presents.

Should the wife die after marriage without bearing a child to her husband, he may claim from her parents one of her younger sisters as wife in her place, or demand the return of the price originally paid for her.

This same course of action is open to the husband should he divorce his wife on account of a fault committed by her. On the other hand, should the divorce be due to the fault of the husband, and the woman marry again, the price originally paid is returnable.

Amongst certain Kavirondo tribes (Nyole, Lakoli, Ithako, Ishuka) the son-in-law retains a claim to all the produce of the cows which he paid for his wife, till such time as all the cows originally given have died.

On death a man's property is divided equally between his children, and his widows go to live with their sons. Should there be left a widow with small children and no grown-up son, she becomes the wife of the eldest son by another wife, or if there be no grown-up son, of the brother of the deceased.

¹ Cf. note, p. 195.

A man cannot marry his aunt; she is consequently pensioned off with one cow.

JALUO NILOTIC KAVIRONDO.

As with the other branch of the tribe, marriage is arranged by an early betrothal, and the price is paid by continued small payments from time to time. Should these payments cease before the agreed price has been liquidated, the girl returns to her father's house.

If the wife should prove childless, the payments are returned to the husband, or the father-in-law provides him with another wife.

Should a wife desert her husband and marry another man, the first husband is entitled to receive from the second the same price as that he originally paid his father-in-law. If there have been children of the union before the desertion of the wife, they remain with their father.

A man's property goes on his death to his children, but if they are small, to the eldest brother.

If the eldest son is grown up he takes all the property in the first instance, but is bound to give a share to each of his brothers. Should he have sisters, the marriage payments for them go to the eldest brother of the deceased, who also takes the deceased's wives, with the exception of the youngest, who goes to the eldest son.

Though the Kavirondo do not wear clothes, a breach of decorum such as touching the ornamental tail worn by the married women is regarded as a punishable offence. (See Mr. Partridge's Report below on Criminal Case 274/1904.)

A person challenged may swear to his innocence or his veracity by stepping over a piece of "Murembe" tree placed between him and his challenger, and saying, "If I am guilty," or, "do not speak the truth, may this tree rise and kill me." If "Murembe" is not procurable, a solanum plant known as "Tunguja" in Ki-swahili is used. (Hobley.)¹

Report by Mr. Partington on Criminal Case 274/1904, Town Magistrate, Kisumu.

Rex v. Mania and Others.

Any act, such as touching the "tail" of a married woman, or in the case of an unmarried girl her frontal beads, and, of course, much more her private parts, is considered among the Nilotic Kavirondo an indecent offence. The woman should at once go back to her village and remain in her hut for certain days of purification. It is left largely to her discretion to decide the amount of moral damage she has suffered, and the number of days of purification required. Meanwhile the "Wazee" send for the offender and arrange the matter. Usually a feast paid for by the man ends the matter

¹ Cf. note, p. 195.

unless he has assaulted her. Although these customs are still kept up in their own homes, they are not so strict outside as formerly.

In the present case, however, the Nilotic Kavirondo would, I think, undoubtedly regard the Kavirondo girl as having been made unclean.

AKAMBA.

Habitat.—From the Nyika tribes near the coast north-westward to the Kikuyu country.

Murder is compensated for by the payment of blood money, and this compensation is payable whether the death was caused intentionally or by accident.

Payment for a man is eleven cows, one bull, one goat; payment for a woman is four cows, one bull, one goat: the cows being the compensation payment and the bull and goat the elders' fee. No compensation is payable in the case of a man who is killed while trespassing in a strange boma or shamba by night.

Theft is punished by the thief being ordered to restore the property stolen, and to pay a fine to the elders according to the value of the property.

The punishment for rape is for the offender to be beaten and to pay a bull as compensation to the woman's husband, or if unmarried to her father. Should the offender be killed *in flagrante delicto*, no compensation is payable.

Assault resulting in injury to person is compensated on the following scale:

Injury to Man.					Compensation.
Simple assault.	.	.	.	.	1 goat.
Loss of hand or arm	.	.	.	.	5 cows and 1 bull.
„ leg	.	.	.	.	Do. do.
„ eye	.	.	.	.	1 cow.
„ both eyes	.	.	.	.	11 cows and 1 bull.
„ nose	.	.	.	.	1 cow and 1 bull.
„ teeth	.	.	.	.	1 goat for each tooth.
„ finger	.	.	.	.	1 cow.
„ ear	.	.	.	.	1 goat.
„ hearing	.	.	.	.	1 cow.
„ male organs	.	.	.	.	5 cows.
Injury to Woman.					Compensation.
Loss of hand, arm or leg.	.	.	.	.	1 cow.
„ eye	.	.	.	.	1 bull.
„ both eyes	.	.	.	.	2 cows.
„ finger	.	.	.	.	1 bull.
„ breast	.	.	.	.	1 cow.
„ both breasts	.	.	.	.	2 cows.

Compensation for injury done to a woman goes to her husband or father as the case may be.

As in English law drunkenness is no excuse for an injury done, but should a guest, while at his host's boma at a drinking bout, either commit an offence himself or be killed or injured by a third party before reaching home, his host is responsible for payment of the resulting compensation.

In like manner, should one person employ another on his business and he meet with an accident while so employed, the person who employed him is liable to pay compensation.

In like manner also, the owner of a bull or cow that does injury is liable to pay compensation for the injury done.

Certain trees are considered sacred by the Akamba, and should any one damage one of these trees he is fined one cow and one bull, which go to the elders.

No one has the right to obstruct a road or water-way, and any interference with a water-trench is punished by the fine of one bull.

Marriage is arranged by purchase, and no woman can hold property.

All family property is vested in the head of the family and on his death everything passes to his eldest son, who assumes the headship of the family, with the obligation of providing the marriage price for his brothers with which to purchase wives.

The purchase price of his sisters is divided amongst the whole brothers of the bride; should she have no whole brothers, then amongst her brothers of the half blood.

Should a man get an unmarried woman or the wife of another with child and she die in giving it birth, he has to pay blood money. If, however, before her death he had made an arrangement to pay the marriage price, no blood money is payable.

The Akamba have no form of oath considered generally binding, but perform certain rites to evidence the honesty of a claim to property.¹

If the eldest son at the time of his father's death is a minor, the eldest surviving brother of the deceased acts as guardian.

The widows of the deceased remain in the boma as members of the family.

There is no individual ownership of land, but family rights of occupation are recognised.

AKIKUYU.

Habitat.—From the Ngong hills along the slopes of the Escarpment in a north-easterly direction to Mount Kenia.

A death, whether caused by accident or design, is compensated for by a payment of a hundred goats in the case of a man, and thirty goats in the case of a woman.

¹ Cf. note, p. 195.

Injury to the person is compensated for by a scale of payments as follows:

Loss of leg or hand	50 goats.
Loss of a finger	10 „ for every joint.
A serious spear-wound	30 „
An ordinary sword-wound.	1 sheep compensation and 1 sheep to be eaten in common.

If a thief steal goats he must repay ten for every one stolen.

Theft of honey from a honey barrel is punished with a fine of ten goats; theft of a sword, one goat; theft of produce from a shamba, three sheep.

Theft of ivory can never be compensated for, and a man's heirs may be called on to pay for stolen ivory without reference to any previous payments that may have been made.

If a man burn down another's hut, the compensation payable is thirty goats.

The punishment for adultery is ten goats compensation to the injured husband, and a fine to the elders.

Should the slayer of another be too poor himself and his family to pay compensation, he has to serve the family of the deceased until the debt is paid.

If death be caused by a child and his family be unable to pay, he is on attaining manhood treated in a like manner.

If the death be caused by a girl, the price paid for her on marriage can be claimed by the relatives of the deceased.

Marriage is a matter of purchase and sale in which the woman has no say, as the contract is usually made when the woman is quite young. The woman remains with her parents till about the age of fourteen, when her husband comes and takes her away. The average price paid is thirty goats.

Should a wife desert her husband and go to another man, he must pay the husband the price paid by him for the woman, in which case he can keep her. Otherwise he sends her back and pays ten goats to the husband. The feelings of the woman are not consulted, and cases are known where women have hanged themselves rather than live with a man whom they do not like.

Should a woman desert her husband and return to her father, the father must repay the husband the marriage price.

In only one matter does it appear that a woman is regarded otherwise than as a chattel. A debtor may satisfy his creditor with the payment of a woman, but this can only be done with the consent of the woman herself.¹

¹ Report by Mr. Donald on Civil Case 137/1904, Collector Dagoretti, *Methiga v. Karoga*.

On death a man's property is taken charge of by the eldest son if of age, to divide equally between all the sons.

If there be no son or no son of sufficient age to take charge of the property, it passes to the eldest surviving brother.

Whoever takes charge of the property takes over with it responsibility for payment of the deceased's debts and for the maintenance of his widows.

It is the usual custom to pay three goats to the elders for hearing a shauri, the equivalent of our "Court Fee" on taking out a summons.

The Akikuyu have no recognised form of oath, so far as ascertained.¹

Report on Methega v. Karoga.

Kamao, brother of the defendant, who had died just about the time of the famine, had stolen three goats of the plaintiff. The plaintiff took no action in the matter till February 23, 1904, when he instituted proceedings against Karoga, brother of Kamao (deceased), for the recovery of these goats in the Court of the Collector at Dagoretti. The case came on for hearing on February 27. It having been ascertained that defendant had succeeded to his deceased brother's property and also got possession of his wife and child, judgment was entered in favour of plaintiff for thirty goats against defendant in accordance with Kikuyu custom. Njoroga (Chief) gave evidence in the case as to the custom among Kikuyus in such matters. After this the parties effected a compromise out of Court, the defendant agreeing to make over his deceased brother's daughter, Nbothi by name, to the plaintiff in full satisfaction of the decree. I do not think that there can be any doubt that this compromise was acted upon for the time, and there is nothing to prove that the officials at Dagoretti had any knowledge of it. No complaint was made to them. Apparently the girl was not satisfied, for she on four occasions ran away from plaintiff and went to her mother's place, who was at the time a mistress to one Kachuhi, living on Dr. Scott's land. Kachuhi is said to have been her lover since her husband's death. The plaintiff alleges that the girl left him at the instigation of her mother. The issue arises whether defendant had power to effect this compromise. From the evidence of nine of the important chiefs, and also from plaintiff's statement, it is evident that the defendant had no power according to the Kikuyu custom to enter into this arrangement *without the consent of the girl*. It is clear that the girl was not a consenting party. The only person who affirms he was vested with such power is the defendant himself.

NANDI.

As with other tribes, marriage is a matter of purchase, and if the wife prove childless the price paid is returnable.

¹ Cf. note, p. 195.

The eldest brother of the deceased inherits all his property including his wives, with the exception of his weapons, which go to the eldest son.

NOTE.—The meaning and object of an oath as generally understood among the native tribes partakes rather of the nature of "trial by ordeal" of an accused person than of a mode of adding solemnity to evidence. The method of trial by an ordeal of poison and by certain forms of "making dawa" or witchcraft are prevalent among most tribes, particularly those of Bantu origin, in addition to or in place of the forms of oath quoted above. It is consequently contrary to native ideas that a person who is a witness only should be made to undergo an ordeal which should, according to their way of thinking, be reserved for the accused. This conception of justice, common to all peoples in a primitive stage of development, that an accused person must clear himself of the charge, and may do so by accepting an ordeal, does not accord with our system, which strives to bring home to the mind of the witness the serious responsibility that lies upon him to speak the truth, inasmuch as the fate of the accused depends directly on his evidence. There would, however, seem to be no reason why the natives should not be further educated to this point of view by the ordeal form of oath, where one exists, being adapted to the requirements of our system of trial, which removes responsibility from the accused and places it on the witness. The members of those tribes who do not understand the nature of an oath may be affirmed to speak the truth. (*Vide* Native Oaths Ordinance, 6 of 1906.)

NOTES.

Comparative Law in Blue-Books.—The Dominions Department of the Colonial Office has made a new departure in publishing a blue-book containing a report upon the work of the Department for the year ending March 31, 1909 (Cd. 3735, King's Printers, 11*d.*). It is in effect a review of the principal events in the self-governing dominions and includes a brief survey of the legislation. The text of some Acts of special interest passed during the period under review is published in an Appendix. There are three each of New Zealand and the Transvaal, two each of the Commonwealth of Australia, New South Wales, Queensland, and Natal, and one passed by the Western Australia Legislature. Another Appendix contains a list of the more important blue-books relating to the dominions published in the year, but does not give the prices nor any information beyond the titles.

Electoral Systems.

A Royal Commission was appointed in 1908 "to examine the various schemes which have been adopted or proposed, in order to secure a fully representative character for popularly elected bodies." Their report (Cd. 5163, Eyre & Spottiswoode, 6½*d.*) comments upon the laws in force in European countries and various parts of the British Empire. Appendices contain the text of the statutes relating to the Alternative Vote in Queensland and Western Australia, and extracts from the report of the Chief Electoral Officer upon the working of the latter in the General Election of 1908, and a description of the systems in force in other countries, with details as to the laws in Belgium and France and the transferable vote in Tasmania.

Patents.

The Colonial Office have issued a list (Cd. 4996, His Majesty's Stationery Office, 1*d.*) of colonial laws dealing with patents, trade marks, and the marking of merchandise, and regulations issued thereunder. No particulars whatever are given of the laws, but only the references. For particulars of the laws, reference may be made to a recently published volume by Mr. W. C. Fairweather, with the title *Foreign and Colonial Patent Laws* (London: Constable & Co.).

Second Chambers.

A return has been published by the Colonial Office (House of Commons Paper, No. 81, 2½d.) to show for each legislature in the self-governing dominions (1) the composition of the Second Chamber and the method of nomination or election; (2) its powers or disabilities with regard to (a) finance and (b) general legislation; (3) the provisions, if any, for the adjustment of the differences which may arise between the two Chambers with regard to (a) finance and (b) general legislation.

Wild Animals.

Correspondence during the year 1909 between the Foreign Office, Colonial Office, High Commissioner of South Africa, and the governors of other African territories in respect to the preservation of wild animals has been published in a blue-book (Cd. 5136, King's Printers, 1s. 3d.). The text of various Acts and Ordinances which have been modified during the past two years is given in the course of it,¹ and finally extracts from Ordinances, Proclamations, etc., defining game reserves in British Colonies and Protectorates.

Domestic Relations in Japan.—The rapid transformation of Japan gives a special interest to this article by Mr. Masuji Miyakawa. Sir Henry Maine has noted in his *Ancient Law* the remarkable persistency among the Romans of the *patria potestas*. Not less remarkable is its sway in Japan under what is called "the power of the family head." It still dominates all rival legal conceptions. In the political sphere this is illustrated in the Japanese fidelity for 2550 years to the Imperial dynasty as head of the great family of the State—the supreme *paterfamilias*. But it is "pretty to observe," as Mr. Pepys would say, how this doctrine of the *patria potestas*—this *imperium in imperio*—is under the influence of modern ideas passing through the same change that it did in Rome. Public opinion tempered by degrees that strange domestic despotism, and there were duties attaching to the patriarchal head, such as the moral obligation to provide for all members of the family out of the common fund, which balanced the rights. In modern Japan the old feudal absoluteness of the family head has gone. His powers are to be exercised "only for the best interests of and when necessary for the administration of the house"—so the Japanese Court of Appeal has decided—and "if injustices are alleged the Court are to investigate them and set aside, if necessary, any unfair exclusion of a member by the family." If a family head abuses his powers, such powers may be suspended. In a word, the rights of the *patria potestas* are fading, while its duties are emerging into clearer relief.

"The Broad Stone of Empire."—Under this title Sir Charles Bruce has written an interesting and valuable work dealing with "Problems in the

¹ See also *Legislation of Empire*, Index s.v. "Wild Animals, Protection of."

Crown Colonies"—problems of the form of government, problems of law, of religion, of health, of population, of education, of fiscal systems, of schemes of defence—agriculture and forestry, transport and telegraphs, tropical diseases, and intoxicating liquors, earthquakes, storms, and insurance of crops. On all of these topics and many more Sir Charles Bruce has something suggestive to say derived from his long experience as a colonial administrator. To him all the subordinate problems present themselves as part of the general problem of adapting to every constituent portion of the Empire the principles that underlie the British Constitution. These principles he expresses figuratively under the title of *The Broad Stone of Empire*, adapted from Sir Kenelm Digby's well-known work, *The Broad Stone of Honour*, and he illustrates them by a graphic anecdote of the Bishop of Strasburg. The Bishop sent his brother, Count Rathol, a large sum of gold to build him a strong castle as a place of security against the power of the Emperor. When he arrived at Hapsburg no walls appeared; instead of them he saw only two lines of warlike troops, infantry and cavalry, and heard a flourish of trumpets. Surprised and incensed, he demanded the reason. "These," said the Count, "are all our people ready to do us honourable service, and this is better than stone walls without hearts and arms to defend them." And so in the love and fidelity of its people, its civil and religious liberty—the recognition of what Alexander Hamilton called the "sacred rights of mankind"—Sir Charles Bruce finds the "Broad Stone" of the British Empire. Everywhere it is the ethical basis on which he lays stress. But the merits of the work must be reserved for fuller consideration than can be given them in the compass of a Note.

Defamation and Reputation.—When an action is brought against a person for defamation he has a right to minimise damages if he can by showing that the plaintiff's previous character was so notoriously bad that it could not be impaired by any fresh accusation, even though undeserved. For the gist of the action is the injury done to the plaintiff's reputation, and if the plaintiff had what Mr. Mantalini would call a "demnition" reputation he cannot be entitled to more than nominal damages. But this way of proceeding is, as Dr. Blake-Odgers says, "a very dangerous one," and so it proved in a recent New South Wales case of *Raftery v. Russell* (10 N.S.W. 200). The defendant there, a farmer, had used words conveying very serious imputations on the chastity of a fair widow who lived in the same district and took boarders. He was sued for slander, and to justify his plea of "not guilty" and minimise damages, he told his nephew to "see people about the case," "to inquire in connection with the case in general." Thus instructed, the nephew saw "a good few in connection with the case," that is, in reference to the lady and her character: interviewed people who had boarded with her and advertised in the *Daily Telegraph* trying to get the names of other persons who had boarded with her. In making these inquiries the defendant

was acting within his rights; but he was "playing with edged tools," and the judge at the trial directed the jury that on the question of damages they might take into consideration—by way of aggravation—the inquiries made, and acting thereon the jury found a verdict for the plaintiff, with damages £350. This was said to be misdirection, and on an application for a new trial one judge held that it was, but a majority of the Court held the other way. Advertising under such circumstances is very like insinuating a fresh imputation.

Laws of Inheritance among Uncivilised Peoples.—The more closely the institutions of barbarous or semi-barbarous nations are studied, the greater appear their diversities. We have learned to realise the immense variety of dialects to be found within a small area of Africa, for example. We are beginning to do the same with respect to the laws and institutions of such races. Mr. Torday in a paper lately read at the Geographical Society on the "Land and Peoples of the Kassai Basin," brings out this point in several striking ways. For example, as to inheritance, he remarks as to the Baboma tribe, "a peculiarity in their social organisation is seen in the fact that a man's property is inherited by his wife if he has no brothers (who are the normal heirs). To this there is an exception in the case of the chieftainship, which, if the deceased has left no brother, descends to the son, or failing a son to the daughter." In the neighbouring tribe of the Basonge, "power is inherited in the male line, but the actual successor is chosen by the senior elder after consultation with another or with the others." Among the Basongo Meno, "the property of a man is inherited by his children in order of age and irrespective of sex." Among the Bankutu, property descends in the male line, but there are indications that at one time relationship was considered stronger on the female side. Among the Bapindji, property descends in the female line. The tribes or sub-tribes with these varied customs live in economic circumstances much alike; a fact worthy of the consideration of those who are tempted to indulge in plausible explanations of legal differences by purely economical causes.

Primitive Government in the South Seas.—One day we shall perhaps have a real account of the forms of government among primitive people; not an account of what hasty travellers, and still more hasty theorists, assume them to be, but the actual forms. The materials are accumulating, and among those recently collected we would call attention to the results of the researches of Dr. Richard Thurnwald of Berlin, who in the *Zeitschrift für vergleichende Rechtswissenschaft* gives an account of the laws of the natives of the South Seas of the Melanesian group. Among them exist no regular law and no legal maxims. But they have a latent *Rechtsbewusstsein* which leads them to act in certain ways, to approve of certain conduct, to disapprove of others. They have even a certain rudimentary international law. The peculiarity of the society is an elaborate system of alliances between the chiefs; alliances which change from time to time.

The society is a "Bündnispolitik unter souveränen Herrschern." The whole article is instructive, and will help to enlarge and correct notions as to primitive governments.

Legal Bibliography.—Several periodicals here and abroad give information as to legal bibliography. All the same, we welcome the proposal to establish at Berlin an International Institute for the Bibliography of Jurisprudence. According to the programme, the Institute promises to do for jurisprudence what has been done by the International Institutes for "Sozialbibliographie," for "Techno-bibliographie," and for the bibliography of medicine. It will endeavour to deal not only with books, but also with periodical literature. Renan is reported to have said, "Fifty years hence no one will open a book"; the book would have been superseded as something too cumbersome and pedantic for future generations. And certainly in law a vast amount of general work is buried in periodicals the contents of which may be unknown to the more industrious student.

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SOCIETY OF COMPARATIVE
LEGISLATION.

EDITED FOR THE SOCIETY BY
SIR JOHN MACDONELL, C.B., LL.D.,
AND
EDWARD MANSON, ESQ.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τὸ τ'ὀρθῶς ἔχον ὁφθῇ καὶ τὸ
χρήσιμον."—ARIST. *Pol.* II. I.

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PROFESSOR HEINRICH LAMMASCH.

[Contributed by PROFESSOR REDLICH.]

PROFESSOR HEINRICH LAMMASCH, the new President of The Hague Tribunal, comes from an old Austro-German stock, having been the son of a lawyer in the small town of Seitenstetten in Lower Austria in the year 1853. Having taken his degree of a Doctor juris utriusque in the University of Vienna in 1876, he travelled the following year through Germany and England, became in 1878 Lecturer (Privatdozent) for Criminal Law and Procedure in the Law Faculty of the University of Vienna, and in 1882 Extraordinarius Professor of the same branch of Legal Science. In this time he published his first writings: 1879, a treatise on the Attempt of Crime (*Ueber den Versuch des Verbrechens*); 1882, a book under the title *Ueber die Auslieferung* (On Extradition). This work soon after its publication was translated into French. From 1885 to 1889 Professor Lammasch taught as Ordinarius Professor at the University of Innsbruck; in the latter year he was called back to his mother university of Vienna, since which time he has occupied the chair of Ordinarius Professor of Criminal Law and Procedure, International Law and Philosophy of Law. Whereas Lammasch in his first studies and writings showed himself more inclined to the traditional view of Criminal Law from a philosophic and speculative standpoint, his first experience of English institutions gave him a valuable impulse to come nearer to the practical and legislative problems of modern criminology. One of the first-fruits of this change of views was an essay, published in 1878, on the Reformatory School of Redhill near London, at that time a great achievement in this special field of Social and Criminal Reform. Professor Lammasch, having become the most influential teacher of Criminal Law in Austria, turned his attention and his work to the great tasks of legislative and administrative reforms of Penal Law and Procedure. At the same time he devoted a great part of his literary and academic efforts to support that powerful development of International Law in theory and practice which has been witnessed by us all in the last twenty years. By a great number of essays, articles, and treatises published in the leading scientific reviews of Germany, Austria, and France, he took a prominent part in the reform movement in both Criminal Law and International Law. He published a treatise, *Auslieferungspflicht und Asylrecht*, in 1886, and an essay on Treaties of International Legal Assistance (*Rechtshilfeverträge*) in

Holtzendorff's *Handbuch des Völkerrechtes*, 1887. A very useful fruit of his academic work was his book *Grundriss des österreichischen Strafrechtes* (Outline of Austrian Criminal Law), which has just been published in a fourth edition.

His important literary and theoretical work opened to Professor Lammasch the way for a very successful activity in the legislative and diplomatic spheres. He was nominated in 1899 one of the delegates of Austria-Hungary to the first Hague Peace Conference and there he became a member of the Committee of Examination, which really has done most of the work of the Conference; he worked there together with men like Bourgeois, Lord Pauncefoot, Holls, Zorn, Martens, Asser, Descamps, Count Nigra, and Odier. In 1902 the Austrian Government again entrusted to Professor Lammasch part of a very important diplomatic task: he was sent to Brussels as adviser of the Austrian representatives at the International Sugar Conference, which abolished by agreement of all States concerned the institution of Sugar export-bounties. In the same year Professor Lammasch, for the first time, was called upon to take part in international arbitration; he decided the Venezuelan case between Great Britain and the United States. In the year 1905 Dr. Lammasch, together with the Chief Justice of the United States, Melville Fuller, and Savornin Lohmann, decided the Muskat case. During the last two years he has been called upon to perform one of the greatest tasks which international arbitration has solved: as President of the Court of Arbitration at The Hague he gave the decision in the famous Newfoundland Sea Fisheries question between Great Britain and the United States and in the Orinoco Boundaries question between Great Britain and Venezuela.

Not less conspicuous is the work done by Professor Lammasch in the domain of Austrian legislation during the last decade, especially so far as Criminal Law is concerned. It was mostly through Dr. Lammasch's exertions that the draft of a new Penal Code, which followed very much the old lines of German theories and neglected the modern ideas of Criminal Law, was withdrawn in 1897 and that the work was begun on an entirely new basis. He was then a member, and later on President, of the Special Commission nominated to elaborate a new Penal Code; in the year 1909 this Draft Code was published, and embodied in many parts the best experiences and ideas of foreign progressive legislation. Since 1899 Professor Lammasch has been a member of the Upper House of the Austrian Imperial Parliament and figures there as one of the leading men of the Conservative Party, to which he belongs.

TOWN PLANNING.

[*Contributed by* R. E. WILLCOCKS, ESQ.]

I. INTRODUCTION.

IN the following short comparative study of town planning schemes in various countries in Great Britain, Germany, New Zealand, Sweden, the Transvaal and the Orange River Colony, it will be remarked that the Transvaal and the Orange River Colony have been treated separately and not directly compared as has been done with the other four countries. This differential treatment is due to the fact that the laws dealing with town planning in the two South African states contemplate a different meaning than the Acts applying to the other older and smaller countries. In the South African Acts, the word "township" is invariably used—this word is not to be found in any of the other Acts, whether British or its equivalent in any foreign Act—and the Acts are called "Townships Acts," and from this it may be gathered that the State controls the number of towns to be built and also controls the situation of such towns, while at the same time it makes regulations as to sites, open spaces, and laying out generally.

Regarding the legislative measures applying to Great Britain, Germany, New Zealand, and Sweden, it will be seen that there is not very much difference in the general idea, which is to safeguard the inhabitants of towns from living in overcrowded, sunless, and unhealthy areas. The difference of procedure is, of course, extremely varying, and Great Britain has a system of procedure which is entirely her own and one which would hardly be applicable in a country such as New Zealand although a British Dominion, on account of the different circumstances of the two countries.

In Germany the Prussian Act contemplates the reforming of cities already in existence, which is not contemplated by the British Act, unless it may be said to apply to areas unfit for human habitation and condemned as such under the housing part of the Housing and Town Planning Act, 1909.

The system of holding a local inquiry by an Inspector or an official of the central administrative Department of the State is to be found only in Great Britain and in the Orange River Colony. In other countries no open inquiry is held, and the persons or bodies interested have not the same latitude for stating their views of the proposed town planning scheme and appealing to the Central State Department (in Great Britain the Local Government Boards for England and Scotland) in case of an unsatisfactory

decision by the local authority. There is provision in the British Act (s. 58 (1) to (16)) for compensation to be paid to any person whose property is injuriously affected by a town planning scheme, and a remarkable fact in this part of the British law is that when a property is increased in value by the making of a town planning scheme the local authority may recover half the increased value of the property. In all matters of dispute as regards alleged injury to or increase in the value of the land the Local Government Board of either England or Scotland has statutory powers to appoint a single arbitrator to settle the facts at issue.

In conclusion it is interesting to note that the Swedish and Prussian Acts were passed in 1874 and 1875 respectively. In 1875 the English Public Health Act was passed, and this measure was a great step in advance, inasmuch as it increased the powers already given to the local authorities to govern and order their towns. It should be especially noted that there is no English town planning Act as such; in New Zealand town planning is part of the land policy of the Government and is therefore a portion of the Land Act.

The same principle partly applies to the Prussian Act, but in the Prussian Act, town planning is the principal part of the Act, and housing takes a minor position. The German ministerial orders based on the Act deal very largely with housing questions. These ministerial orders are exceedingly comprehensive and their rules very rigid and stringent as regards the width of streets and the necessity for light and air. It should be noted that the German Act cited in this article applies in its entirety only to Prussia, being really an Act of the Prussian Parliament (not the Imperial Parliament or Reichstag); but the States forming the German Empire have adopted the Act almost without alteration, although in some cases slight changes have been made. In Saxony, for instance, different regulations are in force as regards roads in urban districts.

The Swedish town planning regulations are contained in an Act called Building Law for Towns, and are such as suit a northern and comparatively sparsely populated country. There is nevertheless a very strong general resemblance between the Swedish and Prussian Acts, and the section of the Swedish Act dealing with the actual laying out of the town is almost identical with the corresponding section in the Prussian Act.

In France there is as yet no general Town Planning Act, but in Appendix 1 to the Beauguire Town Extension Act, 1910, there are various rules and regulations set out, which require the municipal authorities of towns of over 10,000 inhabitants to prepare a town extension and improvement plan. The regulations as to the position of public squares, gardens, open spaces, and the width of roads resemble the legislative measures in force in the other countries dealt with in this article. These regulations are not to become law until 1915. One curious provision contained in these rules is that a plan once approved remains in force for a period of thirty years,

after the expiration of which time the plan must be renewed. This provision seems to be contained only in the French Act.

In the following pages the Acts and Ordinances of Great Britain, Germany, Sweden, and New Zealand have received particular attention under various headings which have been adapted from the British Act.

II. PREPARATION AND APPROVAL OF TOWN PLANNING SCHEMES.

Great Britain.—A town planning scheme in Great Britain may be made as respects any "land which is in course of development or appears likely to be used for building purposes,"¹ which expression includes "land likely to be used as or for the purpose of providing open spaces, roads, streets, parks, pleasure or recreation grounds."²

The Local Government Board of either England or Scotland have power to decide whether land is likely to be used for building purposes, and from their decision there is no appeal.³ Before a town planning scheme is approved notice must be published in the *London* or *Edinburgh Gazette* that the Board intend to give their approval. If within twenty-one days of such notice any person or authority interested objects, the draft order of the Local Government Board is to be laid upon the table of both Houses of Parliament. If within thirty days either of the Houses presents a petition to His Majesty against the draft order, no further proceedings can be taken thereon, without prejudice to the making of any new draft scheme.⁴

Germany.⁵—In Prussia the making or alteration of streets and street lines and building lines (*Strassen- und Baufluchtlinien*) has to be arranged and carried out by the municipal executive with the concurrence of the elected members of the Local Council (*Gemeinde*).⁶ The police (*Bau-Polizei*)⁷ can demand the fixing of such lines, and care must be taken for proper facilities as regards traffic, arrangements for avoiding fires, and public health (*Forderung des Verkehrs, der Feuersicherheit und der öffentlichen Gesundheit*). If the plan affects a railway-station, a fortress, or if public rivers, highways, railways or railway stations fall within the compass of the proposed town planning scheme, the *Bau-Polizei* must notify the Ministers of Railways and of War and other persons concerned.⁸

¹ Housing and Town Planning Act (Great Britain), 1909, s. 54 (1).

² *Ibid.* s. 54 (7).

³ s. 54 (7).

⁴ s. 54 (4).

⁵ As the Prussian Law of 1875, "betreffend die Anlegung und Veränderung von Strassen und Plätzen in Städten und ländlichen Ortschaften," has been adopted almost wholly by all the German States, it is not necessary to mention individually the various laws of the countries forming the German Empire.

⁶ Prussian Town Planning Act, 1875, s. 1.

⁷ *Bau-Polizei* translated literally means Building-Police. The police regulate building operations in Germany, and leave to erect any building or house has to be obtained from them.

⁸ Prussian Town Planning Act, 1875, s. 6; cf. s. 4.

In Great Britain bodies or persons interested in any lands or roads affected by the scheme would have opportunities of placing their views or objections before an officer of the Local Government Board at a public local inquiry, and of appealing direct to the Local Government Board¹; and if the town planning scheme affects light railways, commons or open spaces² or Royal parks,³ notice must be sent to the Board of Trade, the Commissioners for Light Railways, the Board of Agriculture and Fisheries, and the First Commissioner of Works. In Germany, however, if the Bau-Polizei refuse to consent to the scheme prepared, there is not, as in Great Britain, an appeal to a Department of State.⁴

Sweden.—According to Swedish law, "there shall be prepared for every town a plan for the regulation of its general arrangement and of the buildings within it."⁵ This plan shall regulate not buildings and streets alone, but markets and other public places,⁶ and due regard is to be had⁷ for traffic, public health, and avoiding fires, and sites are to be provided for open spaces and harbours. The Town Commissioners are to deal with town plans, but before adoption Royal assent must be obtained.⁸

New Zealand.—New Zealand being a new country with a comparatively small population, the Acts which have been passed to regulate town planning do not contain the same elaborate machinery for the approval of a scheme by the Central State Authority as exists in Great Britain, and in a lesser degree in Germany and Sweden. The legislature of the Transvaal has seen fit to impose regulations and rules more in accordance with the British Town Planning Act, probably in consequence of the less agricultural nature of the Transvaal as compared with New Zealand.

In New Zealand the Act which regulates town planning⁹ deals with the subject in a minor sense—indeed the town planning portion of the statute comprises only four sections. The Town Council—if there is one—has the power of administering the town planning sections of the Land Act,¹⁰ and in every case where any allotments or sections or blocks of land are to be sold or are advertised for sale as a town, the proposed name of such town, showing the roads and the width thereof respectively, and the reserves for open spaces in such town, shall be prepared by an authorised surveyor, and shall be approved by the Governor prior to sale.¹¹

¹ British Act, 1909, s. 54 (4): Procedure Regulations, May 3, 1910.

² Cf. Local Government Board regulations of May 3, 1910, Art. xxix.

³ *Ibid.* Art. xxviii.

⁴ *Ibid.* s. 74, Art. xxviii.

⁵ Swedish Building Law for Towns Act, 1874 (Part 2), s. 9 (1).

⁶ *Ibid.* s. 9 (1).

⁷ *Ibid.* s. 10; cf. British Act, 1909, s. 54 (7). Prussian Act, 1875, s. 10.

⁸ Prussian Act, 1875, s. 10. (Royal assent appears to be the approval of the scheme by the Home Office authorities.)

⁹ New Zealand Land Act, 1908 (Consolidation).

¹⁰ New Zealand Land Act, 1908, ss. 15 and 16. These sections are consolidated from Land Act, 1892, No. 37, s. 17; Land Act, 1902, No. 57, s. 2.

¹¹ New Zealand Act, 1908, s. 16.

III. THE CONTENTS OF TOWN PLANNING SCHEMES.

Great Britain.—The Local Government Board of either England or Scotland may prescribe general provisions¹ (or in certain cases separate sets of provisions) for carrying out the general objects of town planning schemes, and in particular the laying out or treatment of streets, roads, buildings, open spaces, historical objects, sewerage, the sewage disposal, lighting and water supply, etc.²

Where the land connected with a scheme is in the area of more than one authority, or is in the area of an authority by whom the scheme was not prepared,³ the responsible authority for the execution of any works to be executed by a local authority may be either one of these authorities or for certain purposes another local authority or a Joint Board (this Joint Board is specially constituted).⁴

Germany.—By an order of the Prussian Minister of Public Works,⁵ which is based upon the Prussian Act of 1875, the Minister points out that it is desirable to have gardens facing the streets in residential quarters, and it is as well to encourage gardens in business quarters, as it facilitates the widening of the road in case of increase of traffic. The order also says: "Care must be taken for keeping clear from building a sufficient number of open spaces of adequate size for ornament, playgrounds, and parks, as well as for public buildings of the future."⁶

Sweden.—The Swedish Act in many ways resembles the German, and as regards this portion the resemblance is very marked: only the wording of the Swedish Act is such that it is possibly capable of a wider meaning than the Prussian Act. The Swedish Act enacts that care shall be taken when preparing a town planning scheme that roads shall be so designed and laid out as to ensure the safety of traffic, that provision shall be made for light and air, and that houses shall be constructed as to be as far as possible safe from fire.⁷ The clause further lays stress on the necessity for open spaces and enacts that sites must be provided for harbours and markets if required. The local authorities are encouraged to lay out back gardens, which when once made must not be built upon.⁸

New Zealand.—In all towns which are laid off on any Crown lands or upon private lands outside the borough⁹ the main roads must be at least

¹ British Act, 1909, s. 55 (1).

² *Ibid.* Sched. 4.

³ s. 55 (3).

⁴ Cf. Prussian Act, 1875, s. 9: "If several places participate in the adoption of lines (Fluchtlinien), the respective municipal governments (Gemeindeverstandten) must discuss the matter together. A district committee (Kreisausschuss) will decide those points respecting which agreement is not come to."

⁵ An order (Erlass of the Prussian Minister of Public Works, Herr Wirk-Geheimrat Breitenbach) dated December 30, 1906.

⁶ The latter part of the order is of interest because it deals with housing, the height of buildings and dwellings for the working classes.

⁷ Swedish Act, 1874, s. 12 (1).

⁸ *Ibid.* s. 12 (2).

⁹ New Zealand Land Act, 1908, s. 15.

ninety-nine feet wide and the side roads sixty-six feet wide.¹ In towns on Crown lands one-tenth of the area in the town must be laid out as open spaces, and this shall be vested in the Governor-General, and also certain plots should be reserved for municipal property.²

An important and original provision occurs in this Act,³ namely, that on the side of the town opposite to that from which prevailing summer winds blow, a sufficient piece of land shall be reserved for depositing refuse. Provision is also made for cemeteries and gravel-pits in the proximity of a town.⁴ The Government may reserve any land at the disposal of His Majesty within any existing borough or town district under s. 15, although such borough or town district was laid out before the passing of this Act.⁵

IV. PROCEDURE: REGULATIONS.

Great Britain.—The Local Government Board of either England or Scotland in Great Britain is the authority for making regulations generally for procedure and for making regulations as regards preparing, submitting, and adopting town planning schemes. The Act expressly aims at securing the co-operation of the authorities, or of an authority and the owner of the land, and for this purpose the regulations are to provide for conferences⁶ at every stage of the proceedings.⁷ It also sets forth that anterior to and for the purpose of applying to the Local Government Board for authority to prepare or adopt a scheme,⁸ plans and estimates must be submitted for inspection and notices of such intended application must be published.⁹ It is further ordered that before approval is given further plans and estimates shall be submitted to the Board and notices published and objections by persons affected be added.¹⁰ If the Board approve the scheme, the local authority shall publish notices to that effect.

The procedure in Great Britain appears to be very much more detailed and elaborate (apparently to give full scope for appeal from any decision made by a local authority) than in foreign countries.

Germany.—In Germany the administration of the Town Planning Act is put into the hands of the Prussian Minister of Commerce.¹¹ The Minister

¹ New Zealand Land Act, 1908, s. 15.

² The Governor-General may in certain instances, *e.g.* in old or partly built towns (of seven years), modify these provisions.

³ Land Act, 1901, s. 16 (2, c).

⁴ New Zealand Land Act, 1908, s. 15 (2, c).

⁵ *Ibid.* s. 17.

⁶ It should be noted that the Local Government Boards for England and Scotland are two separate and distinct bodies; the former is an independent Department of State, while the latter is a Department in connection with the Secretary for Scotland's Office.

⁷ British Act, 1909, s. 56 (1).

⁸ *Ibid.* s. 56 (2, a).

⁹ *Ibid.* s. 2, c. Sched. 5 and Local Government Board regulations, May 3, 1910 (Part 1).

¹⁰ Local Government Board regulations, May 3, 1910, Art. 12.

¹¹ Prussian Act, 1875, s. 20. The administration of this Act has been transferred to the Minister of Public Works (Öeffentliche Arbeiten) by a proclamation (Allerhöchste Erlassung) of August 7, 1878.

from time to time, when occasion requires it, issues an order in the form of a general letter of advice to local authorities under his control. A final decision¹ in the higher jurisdiction rests in cases of ss. 5, 8 and 9² with the Minister of Commerce, and in cases of ss. 12 and 15³ with the Ober-Präsident.⁴ An appeal against decisions of the District Committee in cases of ss. 5, 8 and 9 may be made by any one concerned to the Bezirk Council within a period of twenty-one days.⁵

Sweden.—The Swedish law compels the authorities of all towns to draw up a plan “for the regulation of its general arrangements, and of the building within it.” The plan shall regulate not only the buildings but the streets, the markets, and other public places.⁶

In the event of a town out-growing the original planning,⁷ all matters dealing with the preparation of town plans are in the hands of the local authority, but the plan has to receive Royal sanction before it can be acted upon.⁸ As in Great Britain, exact and careful plans have to be submitted to the Home Office. There does not appear to be any provision for an appeal to the Home Office or the Sovereign by any person or persons interested in or affected by the scheme.

New Zealand.—In the New Zealand Act, with the exception of the proviso in s. 16 (see Part 1), the Town Council seems to be given a free hand in the matter of town planning schemes, and the Governor-General through the Minister of Lands has power to enforce the provisions of this Act (see Part 2). In towns or Crown lands the open spaces vest in the Government for the benefit of the people.

V. POWER TO ENFORCE SCHEME.

Great Britain.—The powers to enforce a town planning scheme are very wide.⁹ The local authority responsible for the scheme are empowered (after giving notice as stated in the scheme which is such as to contravene the scheme¹⁰) “to remove, pull down, or alter any building or other work in the area included in the scheme,” and also “may remove, pull down, or alter any building or other work in the erection or carrying out of which any provision of the scheme has not been complied with.”

¹ Prussian Act, 1875, s. 18.

² S. 5 deals with the plan which the Bau-Polizei have to give in all cases of the town planning schemes: see Part 5. S. 8 enacts that the District Committee must decide respecting all objections if an agreement is not arrived at between the Municipal Government and the objectors. S. 9: this section orders that if more than one authority is involved, the authorities concerned shall meet to arrange matters.

³ S. 12: this deals merely with the making of by-laws and the procedure of getting them confirmed. S. 15: this section deals with by-laws as applied to various conditions.

⁴ The Ober-Präsident is the administrator of a province.

⁵ Prussian Act, s. 16.

⁶ Swedish Act, Part 3, s. 9.

⁷ *Ibid.* s. 9 (4).

⁸ s. 10.

⁹ British Act, 1909, s. 57 (1, a).

¹⁰ *Ibid.* s. 57 (1, a).

To prevent delay¹ in the execution of any work contained in the scheme, the local authorities may themselves carry out the work required. If a question arises as to whether a building or work contravenes a scheme, the matter shall be referred, unless the parties otherwise agree, to the arbitration of the Local Government Board of either England or Scotland, and from the Board's decision there is no appeal.²

Germany.—The German law on the subject of enforcing town planning schemes is more stringent. When the town planning scheme has been prescribed,³ the owner of the land is definitely subjected to the restriction of any building beyond the line (Fluchtlinie) or new buildings, or the alteration or completion of existing buildings can be prohibited.⁴ The local authority are also empowered, as soon as the scheme is prescribed, to take the areas of land indicated by the street lines (Strassenfluchtlinien).

Sweden.—The Swedish law as regards enforcing town planning schemes is extremely definite.⁵ The Act opens with the following words: "It shall be the duty of the surveyors of buildings to see that this Law of the Urban Building By-laws is duly enforced and to deal with all those matters to which the Law and the By-laws apply, and which do not come into the province of another authority." The surveyors are also enjoined⁶ to improve the plan, if necessary, and are empowered to compel compliance with the scheme which has been duly authorised.

New Zealand.—In the New Zealand Act there are no definite powers accorded to the Governor-General to enforce any scheme.⁷ Where land is being sold for the purpose of laying out a town, an authorised surveyor has to present a general scheme, which the Government may allow or not as it pleases. It is presumed the High Court would enforce any legitimate requirements of the Government in such a case.

VI. TRANSVAAL AND ORANGE RIVER COLONY.

The first town planning legislation to be introduced by the Government of the Transvaal since the Colony became British was by Proclamation in 1905.⁸ Since that date three other Township Acts have been passed by the Parliament of the Transvaal.⁹

The main Act of the Orange River Colony was passed in 1909,¹⁰ and is very similar to the Transvaal Act in its general provisions as regards laying

¹ British Act, 1909, s. 57 (1, b).

² *Ibid.* s. 57 (3).

³ Prussian Act, 1875, s. 8.

⁴ *Ibid.* s. 11.

⁵ Swedish Building Law for Towns Act, 1874, s. 1.

⁶ *Ibid.* s. 2.

⁷ New Zealand Land Act, s. 16.

⁸ Ordinance No. 19 (1905), repealed by Act No. 33 (1907).

⁹ Transvaal No. 33 (1907), No. 34 (1908), No. 30 (1909).

¹⁰ Orange River Colony Township Act, 1909, repealing an Act of the Orange Free State (1874).

out and proclaiming townships. The special provisions for mining districts necessitate special clauses in the Transvaal Act¹ which are not required in the Act which applies to the Orange River Colony—a country which contains relatively small mining interests.

In both Colonies, when it is required to found a township, a formal application must first be lodged, and the sanction of the Colonial Secretary for the Colony must be obtained in both cases; also the consent of the Surveyor-General must be sought.

In the Orange River Colony application is made to the Township Commission, and in the Transvaal to the Township Board. The functions of the two are similar, and the Surveyor-General in the Orange River Colony has a right to be represented on the Commission, while the Surveyor-General of the Transvaal has a statutory claim to be Chairman of the Township Commission. Provision is made in both Colonies for laying out healthy towns with open spaces, which shall ultimately become the property of the municipality. In these provisions the legislative enactments of all those States which have adopted town planning schemes and laws are very similar.²

¹ Transvaal No. 34 (1908).

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THE LEGAL INTERPRETATION OF THE CONSTITUTION OF THE COMMONWEALTH.

[Contributed by A. BERRIEDALE KEITH, ESQ.]

PART I.

THE question of the legal interpretation of the Commonwealth Constitution presents much interest both by reason of the importance of the issues at stake and by the vital difference of opinion as to the fundamental principles of interpretation which have been adopted by the High Court of the Commonwealth and by the Judicial Committee of the Privy Council. It is true that to all intents and purposes the Judiciary Act, 1907, of the Commonwealth has prevented further interference by the Privy Council in the discussion of questions involving the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or of the constitutional powers of any two or more States, but that Act is powerless to undo what has been done or to reverse the decision of the Privy Council in *Webb v. Outtrim*.¹ The Privy Council might indeed be persuaded, as Prof. Harrison Moore² suggests, to act on their undoubted power of reconsidering their judgments and reverse their decision, but no one who weighs the grounds on which that decision was based will think that eventuality any more probable than that the High Court will give the Privy Council an opportunity, by exercise of the right of granting a certificate under s. 74 of the Constitution,³ of having before it a question involving the limits of the constitutional powers of the Commonwealth and a State or States. Nevertheless, so long as the decisions of the High Court and the Privy Council remain unreconciled, it will be impossible to say that the interpretation of the Constitution rests on any sure foundation.

The State Courts and Federal Jurisdiction.—The opposition of view between the two authorities appears even in what might have been held to be the simple question of the relation of the State Courts to federal jurisdiction. In the case of all the States there are in force Orders-in-Council, made under statutory powers, which prescribe the conditions on which appeals lie from the Courts in question to the Privy Council, and in addition

¹ [1907] A.C. 81.

² *Commonwealth of Australia*, 2nd ed. p. 239.

³ On the duty of the High Court not to grant a certificate, cf. *Deakin v. Webb*, 1 C.L.R. 585, at pp. 621 *seq.*; *Flint v. Webb*, 4 C.L.R. 1178.

there is the undoubted power of the King, by virtue of the royal prerogative, to grant special leave to appeal from any decision of a Court of Appeal in any colony, fortified under the Imperial Act of 1844 by a statutory right, to grant leave to appeal from the judicial decision of any Court whatever, whether a Court of Appeal or not. When the Commonwealth Constitution came into force, the State Courts were required by s. 5 of the Commonwealth of Australia Constitution Act, 1900, to give effect both to that Act and to any Acts of the federal legislature as part of their ordinary duty, nor is there any doubt that to these Courts in the exercise of this duty the provisions as to appeal contained in the various Orders-in-Council fully applied.¹

By the Commonwealth Judiciary Act, 1903,² however, the situation was materially altered, at any rate in the view of the Commonwealth Parliament. That Act by s. 39 deprived the State Courts altogether of federal jurisdiction, and then proceeded immediately to re-vest them with such jurisdiction in certain cases, subject to the proviso that the only appeal should be that to the High Court. The power exercised by the Commonwealth Parliament was based on s. 77 of the Constitution, which permits (sub-s. ii) the Parliament to define the extent to which the jurisdiction of a federal Court shall be exclusive of that which belongs to a State Court, and (sub-s. iii) to invest any Court of a State with federal jurisdiction. On the strength of this section of the Judiciary Act it was argued, both before the Supreme Court of Victoria³ and before the Privy Council,⁴ that the right of appeal to the Privy Council under the Order-in-Council of 1860, regulating appeals from Victoria, was taken away by the Judiciary Act, and that an appeal could only be taken to the Privy Council by special leave.

This view was decisively rejected by the Supreme Court of Victoria, and the Privy Council repeated part of the judgment of the Court on this topic with approval. But it is significant that it by no means quotes the whole of that judgment, nor is it probable that it accepted it all.⁵ In the Victorian Court Hodges J. argued that the jurisdiction which the State Court possessed it possessed in its own right as before the Judiciary Act was passed, and he evidently regarded the attempt of the Commonwealth Parliament to deprive the Supreme Court of federal jurisdiction and then to restore it as a mere nullity: all the Commonwealth could do was to confer federal jurisdiction in matters where otherwise the State Court could have none, as, for instance, suits against the Commonwealth, or another State, or the issue of a mandamus to a federal officer, and so forth. This view is not

¹ Cf. 4 C.L.R. 1087, at p. 1141, *per* Isaacs J.

² The question arose also on the earlier Claims against the Commonwealth Act, 1902, investing State Courts with federal jurisdiction in one regard, but in *Hannah v. Dalgarno*, 1 C.L.R. 1, the matters at issue were not finally decided; but see p. 10.

³ [1905] V.L.R. 463, at p. 467.

⁴ [1907] A.C. 81.

⁵ Cf. Harrison Moore, *Commonwealth of Australia*, 2nd ed. p. 231.

alluded to in the judgment of the Privy Council, and it is certain that it is not tenable. It is perfectly clear from s. 77 (ii) of the Constitution, read with s. 76, that the Commonwealth Parliament could deprive the State Courts of the federal jurisdiction which they were exercising before the passing of the Judiciary Act. That jurisdiction they exercised as State Courts—just as they from time to time as State Courts interpreted Imperial Acts without becoming Imperial Courts.¹ It was taken from them by s. 39 of the Judiciary Act, and though it was in substance restored, it was restored as federal jurisdiction exercised by a federal Court. But that fact clearly made no difference to the Order-in-Council permitting appeals. The Court was the Supreme Court of the State: it was not a new Court: it was the old Court invested with a new jurisdiction, and in the absence of express words or necessary implication in the Constitution, the appeal from the Supreme Court applied to the Court in its new jurisdiction, just as it would apply if any fresh jurisdiction were given to the Court by an Imperial or a State Act. This is clearly the determination of the Judicial Committee in *Webb v. Outtrim*.²

The interpretation here put upon the decision of the Privy Council is certainly that put upon it by Higgins J. in his dissenting judgment in *Baxter v. Commissioners of Taxation, New South Wales*.³ He there fully recognises the right of the federal Parliament to exclude State Courts from federal jurisdiction, but he held that if the Supreme Court of a State become seised of a cause, and decided it, the defeated litigant had under the British Acts 9 Geo. IV. c. 83, and 7 & 8 Vict. c. 69, and the Orders-in-Council made thereunder, a right to appeal to the King in Council, no matter whether the Supreme Court derived its jurisdiction from the State Parliament or from the British Parliament or from the federal Parliament, and no matter what the federal Parliament might enact to the contrary. The majority of the Court,⁴ however, took the view, though not very strongly, that the Commonwealth Parliament had in effect created a new Court, and that they were empowered, in creating a new Court, to define what appeals should be allowed, subject always to the right of the Crown to grant special leave to appeal, for they considered that s. 39 was intended to recognise the right of the Crown to grant special leave to appeal. The same view seems to have been held by Isaacs J.,⁵ but the main portion of his remarks on the subject is concerned with the desire to show that the exercise of federal jurisdiction, as given by s. 39 of the Judiciary Act, is different from the exercise of such jurisdiction

¹ Cf. 4 C.L.R. 1087, at p. 1141, *per* Isaacs J.; Griffith C.J. at pp. 1137, 1138, leaves it open whether before the Judiciary Act the jurisdiction was federal or State. Of course, even before that Act, in some cases federal jurisdiction proper had been conferred on State Courts, *e.g.* as regards claims against the Commonwealth, *Hannah v. Dalgarno*, 1 C.L.R. 1, at pp. 9, 10.

² [1907] A.C. 81.

³ 4 C.L.R. 1087, at pp. 1162, 1163. Cf. 1 C.L.R. 1, at p. 6.

⁴ 4 C.L.R. 1087, at pp. 1137-9.

⁵ 4 C.L.R. 1087, at pp. 1140 *seq.*

by a State Court as a State Court under the authority of s. 5 of the Constitution, a proposition which the Privy Council would no doubt have accepted.

Since the discussion of the case in question the powers of the State Courts in the federal jurisdiction bestowed upon them have been diminished by withdrawing from them any question arising which involves the limits *inter se* of the powers of the Commonwealth and a State or States and of two or more States. This is effected by the Judiciary Act, 1907, and it cannot be cited as proving that the view of the position laid down by the Privy Council is accepted in Australia, for admittedly the appeal by special leave remained untouched even by the Judiciary Act, and that would have been sufficient to justify the passing of the Judiciary Act, 1907. It appears also that the late Government of the Commonwealth remained firm in their acceptance of the view laid down by the High Court. As a result of the Colonial Conference of 1907, the rules regulating appeals from the oversea Dominions to the King in Council were to be assimilated, and accordingly rules were drawn up in a new form and adopted by four of the Australian States. Very tardily the Government of the Commonwealth protested against the new rules applying to the Courts in the exercise of federal jurisdiction under the Judiciary Act, and quoted the decision of the majority of the Court in *Baxter's Case* against the proceeding, but the Colonial Office pointed out that this view was opposed to that laid down by the Privy Council in *Webb v. Outtrim*,¹ and no distinction between the two kinds of jurisdiction appears in the Orders-in-Council since issued for Victoria and Tasmania.²

The Appellate Jurisdiction of the High Court.—The appellate jurisdiction of the High Court extends under s. 73 of the Constitution to hear appeals *inter alia* from the Supreme Court of any State or of any other Court of any State "from which at the establishment of the Commonwealth an appeal lies to the Queen in Council." It is possible for the Parliament to limit this right of appeal, but it cannot do so in such a manner as to prevent the High Court from determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lay to the Queen in Council. The High Court in the case of *Parkin v. James*,³ after an elaborate argument, decided that the power of the High

¹ See Parliamentary Papers, Cd. 5273, pp. 39-41.

² It may be mentioned that no attempt has yet been made by the Commonwealth Parliament to limit the classes of cases in which the Privy Council may grant special leave to appeal from a judgment of the High Court. It should be noted that it is perfectly clear that no colonial legislature can under its general power of legislation affect the right of appeal by special leave to the Crown in Council (except the Commonwealth Parliament, when the right is given by s. 74 of the Constitution and the Parliament of the Union of South Africa by s. 106 of the South Africa Act, 1909). That lies not in any special sanctity of that prerogative (cf. Harrison Moore, *Commonwealth of Australia*, 2nd ed. pp. 232, 233), but simply from the fact that 7 & 8 Vict. c. 69 gives a statutory right of appeal by leave which overrides every local Act, and deprives the Canadian Act, which purports to bar appeals in criminal cases, of technical validity. ³ [1905] 2 C.L.R. 315.

Court extended to hearing appeals from single judges of the Supreme Courts of the States exercising the jurisdiction of the Supreme Court. Against this view it was argued very naturally that the purpose of the Constitution was to make the appeals to the High Court come from the full bench of the Supreme Court, just as appeals normally went to the Privy Council only after they had been before the full Court. It was pointed out in support of the view that the interpretation of the words Supreme Court should be read in light of the fact that it was coupled with other Courts from which an appeal lay, and an appeal lay of right under the Orders-in-Council only from the full Court. It was admitted that State Acts frequently sanctioned the exercise of the jurisdiction of the Supreme Courts by single judges, and declared the judgments of a single judge so acting to be judgments of the Supreme Court; but though the force of this argument was admitted, it was pointed out that if it were pressed then the State Parliaments, by abolishing the State Courts *eo nomine*, could defeat the right of appeal to the High Court altogether. The High Court naturally declined to accept this argument, and suggested that the term Supreme Court might well be held to include Courts of similar functions even if of different name. They were unable to accept the view that the term Supreme Court must be interpreted to mean the full Court, and they could not hold that the other Courts to which appeals lay at the establishment of the Commonwealth meant Courts to which appeals lay without special leave.

The right indeed of the High Court to hear appeals from a single judge, if sitting as the Supreme Court, is absolutely clear, and it was affirmed by the Privy Council when the case was brought before it in *Blake v. Bayne*.¹ It is true that the plan of the Constitution as to such appeals was clearly meant to secure that the appeals should not come merely from one judge, thus converting the High Court into a substitute for the full Courts of the States, but it is equally clear that the Constitution made no adequate provision to attain this end. Much more difficult is the question what is meant by other Courts to which an appeal lay to the Queen in Council at the establishment of the Commonwealth. In *Parkin v. James*² the High Court held that the term could not be restricted to cases where an appeal lay as of right, but must include cases where an appeal lay by special leave. Yet this interpretation leads into a serious dilemma, for it is quite certain that the Privy Council could entertain a direct appeal in 1900 from every possible Court in the States³ of the Commonwealth if only in virtue of the Imperial Act, 7 & 8 Vict. c. 69, and on the other hand the insertion of the words was no doubt intended to have some signification in limiting the extent of the appeal given to the High Court. It was never contemplated that the exercise of a petty Court in a State of its ordinary jurisdiction should be

¹ [1908] A.C. 371.

² [1905] 2 C.L.R. 315, cf. 4 C.L.R. 1178, at p. 1180.

³ Cf. 2 C.L.R. 315, at pp. 331, 332.

susceptible of a direct appeal to the High Court. Nor, as a mere matter of fact, is there much doubt what the real intention of the Constitution was : in South Australia there existed in 1900 a Court of Appeals, confirmed by a local Act 24 & 25 Vict. No. 5, which consisted of the Governor in Council ; this Court, which was continued because of the difficulties arising out of the attitude of the Supreme Court and especially of Mr. Justice Boothby in the years immediately following the grant of responsible government, has of late years sunk into disuse, but it was no doubt meant in the Constitution to secure that, if its activity were revived and it became as it once was a real Court of Appeals, then the High Court could hear appeals from it, as well as from the State Supreme Court. But in 1900 there was no appeal except by special leave from that Court, for the Order-in-Council of 1860 merely referred to appeals from the Supreme Court. If therefore the term "other Court from which at the establishment of the Commonwealth an appeal lies to the Queen in Council" is interpreted to mean a Court from which an appeal lay as of right, the Court of Appeals in South Australia, which it was no doubt meant to include, will be excluded, and as a matter of fact the phrase will have no content, as there was no other Court than the Supreme Court of the State from which an appeal lay as of right at the establishment of the Commonwealth (the Vice-Admiralty Courts of New South Wales and Victoria are Imperial Courts, not State Courts at all). On the other hand, if the phrase include all it seems to include, it will again have no point, for as an appeal lay by special leave from every Court the addition of the words "from which at the establishment of the Commonwealth an appeal lies to the Queen in Council" will be otiose and absurd.

The difficulties of the position have already forced themselves upon the attention of the High Court in the case of *Kamarooka Gold Mining Company, No Liability, v. Kerr and Others*,¹ decided in 1908. It was there sought by the company to appeal direct to the High Court against an order of the judge of the Court of Mines, Victoria, rescinding a previous order which he had made for the winding up of the appellant company. It was argued that the Court of Mines was one which at the establishment of the Commonwealth an appeal lay to the Privy Council by special leave, and that therefore an appeal to the High Court was competent under s. 73 of the Constitution and under s. 35 of the Judiciary Act, 1903. The High Court declined to grant special leave to appeal, the case being one in which under the Judiciary Act such leave was necessary. They recognised that it raised the difficult question of the interpretation of s. 73 of the Constitution, and if there were no other appeal open to the company the question might have been considered. But the company had an appeal to the Supreme Court of the State, and thence if need be to the High Court, and therefore the Court did not think the case one in which they should grant special leave to appeal so that the question of the competency of the appeal should be

¹ [1908] 6 C.L.R. 255.

raised. In point of fact, it would seem impossible to interpret the words of the Constitution in any satisfactory sense, and on the mere legal interpretation the High Court would, until Parliament limits the right, seem to have power to hear appeals in every case. Fortunately the decision of that Court in the case of the *Kamarooka Company* shows that direct appeals from inferior Courts will not be encouraged: to do so would be to upset the whole scheme of federal and state jurisdiction, but the bad drafting of the Constitution is indeed curious. Probably the point was overlooked by the Imperial authorities in the midst of the much more important struggle over the right of appeal to the Privy Council.

Another difficulty is suggested by the proviso to the exercise of the powers of the Parliament to limit such appeals from State Courts, which forbids the Parliament to deprive the High Court of the power to determine any appeal in any matter in which at the establishment of the Commonwealth an appeal lay from the State Court to the Queen in Council. The decision in *Parkin v. James*¹ amounts to a decision that this clause forbids the Parliament to deprive the High Court of the right to hear any appeal whatever from the State Supreme Courts, since at the establishment of the Commonwealth an appeal lay from them either as of right or by special leave in every case. This is the scheme adopted by the Judiciary Act, 1903, which provides for appeals as of right in certain cases and by special leave in all others. But again on the theory enunciated by the High Court in the case of *Baxter v. Commissioners of Taxation, New South Wales*,² the restriction on the right of Parliament to limit appeals would not apply to the exercise of the federal jurisdiction which is vested in the State Supreme Courts by the Judiciary Act, 1903, and this conclusion is suggested also by the reasoning of the Court in *Hannah v. Dalgarno*.³ The point is, however, purely academic, for the Parliament is not at all likely to limit the power of the Court to hear appeals. The proviso has, however, one definite effect: the Parliament cannot increase the amount which gives the person aggrieved by a decision of a State Court the right of appeal to the High Court.⁴

The respective relations of the High Court and the Supreme Courts in cases of appeal from the Supreme Courts to the High Court in the exercise of the ordinary jurisdiction of the Supreme Courts were raised in the case of *Bayne v. Blake*.⁵ An action was brought by Bayne in the Supreme Court of Victoria, judgment being given for the defendants. An appeal to the High Court was allowed, and the High Court ordered that the judgment appealed from should be discharged, and that in lieu thereof a declaration and judgment should be substituted providing for the recovery by the plaintiffs of certain sums, which were to be later ascertained by inquiry. The High Court further ordered "that this cause be remitted

¹ [1905] 2 C.L.R. 315.

² 4 C.L.R. 1087, at pp. 1136 *seq.* per Griffith C.J.

³ 1 C.L.R. 1, at pp. 9, 10.

⁴ 1 C.L.R. 1, at p. 9.

⁵ [1908] 5 C.L.R. 467

to the Supreme Court to do therein what is right in pursuance of this judgment."

On November 2, 1906, the Privy Council granted leave to appeal from the judgment of the High Court, but refused an application for a stay of execution. On November 13, 1906, in the Supreme Court of Victoria Hodges J. made an order adjourning the case until the determination of the appeal before the Privy Council, or until a further order. On December 14, 1906, on the application of the defendants, Griffith C.J., of the High Court, ordered a stay of proceedings, but on March 27, 1907, he reconsidered the order, and removed the stay of proceedings so far as was necessary to enable the Supreme Court to proceed with certain enquiries directed by the judgment of the High Court.

On September 27, on the application of the plaintiffs, Griffith C.J. made an order that the stay should be entirely removed. On October 24 the plaintiffs applied to Madden C.J., of the Supreme Court of Victoria, to proceed with the inquiries direct by the High Court, but an order was made that the matter should be deferred until the result of the decision of the Privy Council had been made known. Special leave was granted by the High Court to appeal from this judgment. It was argued in support of the action of the Supreme Court of Victoria that s. 51 (xxxix) of the Constitution, which authorises Parliament to make laws as to matters incidental to the execution of any power vested in the federal judicature, did not authorise the Parliament to regulate the Supreme Court. On the merits of the case there was no ground for proceeding with the inquiry pending the decision of the Privy Council.

The Court decided against the contention on behalf of the action of the Supreme Court. They criticised the dictum of the Chief Justice of the Supreme Court, who had stated that he was not the servant of the High Court, and that the High Court could not direct the Chief Clerk of the Supreme Court to proceed with the inquiries. Although the Chief Justice was not the servant of the High Court he was a citizen of the Commonwealth, and he was bound by the laws of the Commonwealth under s. 5 of the Commonwealth of Australia Constitution Act. He was further bound by the Judiciary Act, 1903, just as was any private person, and s. 37 of that Act expressly provided that it should be the duty of the Court to which a cause was remitted to execute the judgment of the High Court in the same manner as if it were its own judgment. The Chief Justice, although he was not a servant of the Court, was an officer of the law required by law to execute the orders of the Court. It was manifest that the order he made was wrong. It had been laid down before he made the order in the case of *Peacock v. D. M. Osborne & Co.*¹ that the stay of proceedings could not be granted by a Supreme Court. If it was the duty of the Supreme Court to direct its Chief Clerk to make inquiries the High Court was entitled to make

¹ [1907] 4 C.L.R. 1564.

that order. In the United States it was the practice for the Supreme Court to make a direct order on a State officer to obey its judgment. They therefore discharged the order made by the Chief Justice of the Supreme Court, but in view of the circumstances of the case—viz. that the Privy Council was about to deliver its own judgment on appeal reversing the decision of the Court of the Commonwealth—they did not adopt the procedure of directing an inquiry by the Chief Clerk of the Supreme Court.

The Sovereignty of the States.—The question of the position of the States has formed the subject of much discussion between the Imperial, the Commonwealth, and the States Governments, partly in connection with the question of the responsibility of the Commonwealth for external affairs,¹ and partly in connection with the exclusion of representatives of the States from the Imperial Conference of 1907.²

With regard to representations by foreign Powers, it has been held by the Imperial Government that they must look to the Commonwealth in all such questions, and that the Commonwealth represents Australia in these cases. This position has never yet been accepted by the States. Similarly the Governments of the States remain of opinion that they should be represented at the Imperial Conference. It is clear that the position is one of considerable difficulty and that some of the contentions of the States cannot be justified. The Commonwealth is certainly not, as has been asserted by one somewhat too enthusiastic supporter of States' rights, the agent of the States for certain limited functions;³ nor can the claim of the States that they should be consulted on all matters in which the Commonwealth has not exclusive powers be reasonably sustained.⁴ On the other hand, it remains an open question as to whether the States have not reason to hold that they should be consulted on all matters which remain within their exclusive jurisdiction under the Constitution of the Commonwealth, so long as these matters are left to their jurisdiction. It is unquestionably the case that such subjects as settlement of immigrants, the taxation of colonial bonds, judicial appeals to the Privy Council, the reciprocal admission of barristers, the reciprocal admission of land surveyors and so forth, deal with matters which are substantially within the orbit of the exclusive powers of the States. As a matter of fact, a substantial recognition has been given in the case of questions regarding surveyors by the fact that a subsidiary Conference is proposed to be held in 1911, at which the States will be represented as well as the Commonwealth.

The position claimed by the States is certainly supported by the decisions of the High Court of the Commonwealth, which has from the very first

¹ See Parliamentary Papers, Cd. 1587, and Victoria Parliamentary Papers, 1907, No. 23, pp. 37-47.

² See Parliamentary Papers, Cd. 3340, 3524, and 3523, pp. 92-94.

³ Cd. 3340, p. 24.

⁴ See Harrison Moore, *Commonwealth of Australia*, 2nd ed. pp. 350 seq.

asserted in unmistakable terms the position of the States as being sovereign Powers just as the Commonwealth is a sovereign Power. It was pointed out by the Court in *D'Emden v. Pedder*¹ that in considering the relations of Commonwealth and States legislation it must be remembered that both the Commonwealth and States were sovereign States subject only to the restrictions of the Imperial control and to the actual provision of their Constitutions. It follows clearly from this declaration, which has been consistently adopted ever since, that in the opinion of the High Court the Commonwealth must be regarded as a sum of seven separate sovereignties, and not as one sovereignty with six subordinate agencies. The States have in no sense merged their existence in the existence of the Commonwealth, and Prof. Harrison Moore² seems to be in accordance with the spirit of the decisions of the High Court when he lays it down that the States still retain the right to be consulted in all treaty matters concerning affairs in which they have sole legislative authority.

The same conception of the independence of the State and its sovereignty is seen in the decision in the case of *McKelvey v. Meagher*.³ McKelvey was arrested in Victoria and committed to prison for the purpose of being removed to Natal as a fugitive offender in respect of a crime against the law of that Colony. It was urged that the committal was invalid because the police magistrate of Victoria was not a magistrate of a British possession within the meaning of the Imperial Fugitive Offenders Act, 1881. It was said that the Imperial Act conferred the powers of legislation as to fugitive offenders upon a central legislature only, that the central legislature of the Commonwealth was the Commonwealth Parliament, and that that Parliament had not legislated on the subject so as to give the police magistrate of Victoria any jurisdiction. The Court, however, declined to accept that view. Griffith C.J., without deciding whether or not the Commonwealth Parliament had power to legislate as to the rendition of fugitive offenders under the power to legislate regarding external affairs, pointed out that the States still retained under s. 108 of the Constitution the existing law, and that therefore the police magistrate was a competent authority to order the committal of the prisoner. With this view Barton J. agreed, and O'Connor J. went further, for he⁴ expressed the clear view that the Commonwealth Parliament had no power to deal with the subject of the rendition of fugitive offenders, as it was a power which presupposed a uniform condition of criminal law which the Commonwealth Parliament had no authority to effect. All the judges were careful to point out that the term central legislature probably contemplated the case of a central legislature such as that of Canada, the only important federation existing at the time of the passing

¹ [1904] 1 C.L.R. 91, at p. 109.

² *Commonwealth of Australia*, 2nd ed. p. 356.

³ [1906] 4 C.L.R. 265.

⁴ 4 C.L.R. 265, at p. 295. Cf. also p. 293 for case of Union of South Africa.

of the Act, which had full power to regulate criminal law, and contrasted with it the case of Australia.

The same view of the position of the States as autonomous communities side by side with the Commonwealth is shown by the judgment of Griffith C.J. in *Baxter v. Commissioners of Taxation, New South Wales*,¹ in reviewing the decision of the Privy Council in *Webb v. Outtrim*.² "The King," he says, "is the common head of the United Kingdom and of all the self-governing dominions, and the legislature of each of these dominions has, subject to its own constitution, full autonomy. It seems strange that in this year 1907, when the world is resounding with praises of the system of the British Empire,³ which allows its different members to enjoy this freedom and independence, we should be asked to decide solemnly that the idea is an entire delusion. It is now, we suppose, well recognised that, except so far as regards relations with foreign Powers which are not now in question, the King, as head of each of these separate autonomous States, is so far a juristic person that differences and conflicts may arise between these States, just as between other autonomous States which do not owe allegiance to a common sovereign. It is too late to set up a contrary theory unless it is intended to make a revolutionary change in the concept of the Empire." The analogy between the States of the United States and the States of the Commonwealth was in his opinion a perfect one.

The same conception of the States and the Commonwealth as separate juristic entities appears in many other cases. "It is manifest," said Griffith C.J. in the case of *The Municipal Council of Sydney v. The Commonwealth*,⁴ "from the whole scope of the Constitution that just as the Commonwealth and State are regarded as distinct and separate sovereign bodies, with sovereign powers limited only by the ambit of their authority under the Constitution, so the Crown, as representing those several bodies, is to be regarded not as one, but as several juristic persons, to use a phrase which well expresses the idea. No better illustration can be given than is afforded by the lands now sought to be rated, which having originally been property of the State, *i.e.* lands of the Crown in New South Wales, have become vested in the Commonwealth, *i.e.* vested in the Crown in the right of the Commonwealth. The change in constitutional ownership is accurately and unmistakably denoted by the language of s. 85 in which it is expressed."

There is, of course, one obvious objection to the use of the term sovereignty in these cases. Sovereignty is, properly speaking, a term of international law, and in that sense of the word no State of Australia, and not even the Commonwealth itself, can be said to be sovereign. The Commonwealth

¹ [1907] 4 C.L.R. 1087, at p. 1126.

² [1907] A.C. 81.

³ A reference, of course, to the grant of new constitutions to the Transvaal and the Orange River Colony.

⁴ [1904] 1 C.L.R. 208, at p. 231.

is a dependency, or at any rate a portion of an empire in which the ultimate legislative control rests with the Imperial Parliament, while to foreign nations it is represented by the executive government of the United Kingdom, which is in fact dependent on the pleasure of that Parliament. But, on the other hand, the use of the term has the advantage of affirming, what is clearly the case, that within the ambit of authority given to them by their constitutions, the Commonwealth and the State Parliaments are no mere delegates of the Imperial Parliament, but are *pro tanto* clothed with the power of that Parliament itself. On the other hand, there is real danger in ignoring the important fact of the Imperial connection in considering the legal interpretation of the Constitution of the Commonwealth. It is clear that at times at least the High Court has shut its eyes to the facts,¹ and has pictured to itself the Empire as a congeries of self-governing, autonomous communities with a common head, much as were Norway and Sweden before the breach of the Union. But though in large measure in practice this is true, it is essential to remember that what the Imperial Parliament has given it can legally take away, that its laws are still paramount when they come into conflict with colonial laws, and the Imperial Government, though it exercises no direct executive authority in the colonies, possesses the power of disallowance of colonial laws. In all these respects the Commonwealth differs greatly from the United States of America, and it is perfectly clear that this point is obscured by the assertion of the political sovereignty of the States, as though they and the Commonwealth were integral fractions of a sovereignty consisting of a sum of parts.

The Position of the State Governor.—If the States remain sovereign within their sphere of influence, so too the Governor of the State cannot be regarded as an officer of the Commonwealth. The question was decided in connection with a difficulty which arose at the beginning of 1907 in respect of an election to fill the places of the three Senators of South Australia who were retiring at the end of 1906. It was held by the High Court acting as a Court of Disputed Returns that the election was void in respect of Mr. Vardon, one of the candidates, and thereupon the Governor of the State of South Australia, acting on the advice of his Ministers, forwarded a message to the two Houses of Parliament asking them to meet together and select a person as Senator, his advisers taking the view that the failure of the election created a casual vacancy in the State which fell, under the Constitution, to be filled by election by the two Houses sitting together. The two Houses on July 11, 1907, accordingly chose Mr. O'Loughlin to be a Senator. Thereupon a rule *nisi* was granted by the High Court for a mandamus to the Governor directing him to cause a writ to be issued for a new election by the ordinary electorate, the ground being that the Governor had been wrongly advised in thinking that the vacancy which had occurred was a

¹ Cf. Griffith C.J., at 1 C.L.R. 585, at p. 597: "For all practical purposes Great Britain is an entirely different State from Australia."

casual vacancy which should be filled by the two Houses of Parliament, whereas it was really a case for a fresh election.

It was argued before the Court¹ that the Governor of a State was a public officer of the Commonwealth for the purpose of issuing the writ in question, and that a mandamus to make him perform an obvious duty was the proper mode of procedure. But the Court unanimously rejected that plea. It had never been suggested that a State Governor was subject to a mandamus if he failed in his duty to issue writs to summon the House of Assembly upon a dissolution. The case of the election of a Senator was not quite analogous: it was conceivable that the executive government of a State might desire that the filling up of a vacancy should be postponed, and with that end in view might refuse to afford the Governor the necessary administrative facilities. In such a case the Governor might fail in his duty, but it would be a duty which he owed to the State collectively. "It is not easy to see how, in such a case, he could perform his duty without dismissing his Ministers and finding others, and that power is manifestly one the exercise of which could not be reviewed by any authority but the Sovereign. The duty, therefore, is one of the duties which the constitutional head of a State owes to a State (and in the case of a Governor, but in a slightly different sense, to the Sovereign), and its performance must be enforced in the manner appropriate to the case of such duties. Instances of such duties—duties of imperfect obligation—are familiar to students of constitutional law. The Governor, therefore, could not be regarded *quoad hoc* as an officer of the Commonwealth. The States are not subordinate to the Commonwealth, and the Commonwealth judiciary cannot command the Constitutional head of a state to do in that capacity an act which is primarily a State function."

Similarly, in the case of *Horwitz v. O'Connor*² the High Court was asked to intervene in the case of a prisoner in a Victorian gaol who claimed that he was entitled to be released under rules made under s. 540 of the Crimes Act, 1890, of Victoria, which empowers the Governor in Council to make rules for the mitigation or remission of sentences as a reward of good behaviour. The High Court declined to do so on the ground that the only relief which could be asked for was a mandamus to the Governor in Council to consider the matter. But a mandamus to the Governor in Council could not lie, and no Court had jurisdiction to review the discretion of the Governor in Council in the exercise of the prerogative of mercy.

The Commonwealth as Agent of the States.—As we have seen, the claim that the Commonwealth should be regarded as merely an agent of the States was put forward in a somewhat naïve form by a State Premier

¹ *The King v. The Governor of South Australia*, [1907] 4 C.L.R. 1497. That the Governor was wrongly advised was shown by the High Court's decision in *Vardon v. O'Loughlin*, [1907] 5 C.L.R. 201. Cf. Harrison Moore, *Commonwealth of Australia*, 2nd ed. p. 114, n. 1.

² [1908] 6 C.L.R. 38.

in the correspondence with the Imperial Government as to the representation of Australia at the Imperial Conference. The question has received judicial consideration in the case of the *State of New South Wales v. the Commonwealth*.¹ That case arose from the action of the Commonwealth Parliament in 1908 in passing the Coast Defence Appropriation Act, by which a sum of £250,000 was appropriated out of the Consolidated Revenue Fund for the purpose of a harbour and coastal defence (naval) account, which was opened as a trust account under the provisions of s. 62 (a) of the Commonwealth Audit Acts, 1901-6, by the Treasurer of the Commonwealth. Similarly, under the Old Age Pensions Appropriation Act, 1908, a sum of £750,000 was appropriated out of the Consolidated Revenue Fund for the purposes of a similar trust account known as the Invalids and Old Age Pensions Fund. That Act was passed in June 1908, and came into force on the 10th of that month, and in the same month the Surplus Revenue Act, 1908, was passed, and came into force on June 13. The Treasurer then paid to the credit of the Harbour Account the sum of £250,000, and to the credit of the Invalids and Old Age Pensions Fund the sum of £182,000, and debited these sums against the States on the ground that they formed portions of the expenditure of the Commonwealth.

The State of New South Wales claimed from the Commonwealth the sum of £160,000, being the proportion of that amount debited to New South Wales. It was argued for the Commonwealth that under s. 94 of the Constitution all surplus revenue was to be paid month by month to the States. It was said that it was not open to the Commonwealth to put aside in trust accounts funds which they did not actually expend. Under s. 89 balances were to be struck monthly, and the surplus paid over to the States. The mere appropriation of moneys could not be said to be expenditure. It was not a usual and ordinary thing for a Government to set aside revenue and call such a procedure expenditure. The relation of the States and the Commonwealth in respect of surplus revenue bore a close analogy to that of principal and agent, and the duty of the Commonwealth under ss. 89 and 93 of paying over to the States was the same as that of an agent who was directed to pay to his principal the balance of his receipts over the expenditure.

The High Court rejected the arguments urged for the State of New South Wales. They held that in the case of a transaction between principal and agent, if the agent were required to pay over to his principal all moneys collected for him after deducting disbursements made on the principal's behalf, the agent could only bring into account actual disbursements made by him. But it was different with the case of the relations between the Federal Government and the Governments of the States. They were by no means the same as those of principal and agent.² It was

¹ [1908] 7 C.L.R. 179. See also Queensland *Parliamentary Debates*, 1910, pp. 1463 seq.

² 7 C.L.R. 179, at p. 188, *per* Griffith C.J.

impossible to hold that the balances were to be finally struck on the last day of each month; the result would be intolerable confusion, as the Commonwealth might pay over one month large sums, while the next month their receipts would be exceeded by their expenditure. If a sum of money were lawfully appropriated out of the consolidated revenue for a specific purpose that sum could not be regarded as part of the surplus until the expenditure of it was no longer lawful or no longer necessary. Barton J.¹ held that the word "expenditure" would cover sums appropriated even though they were not actually expended. The Constitution did not render the Commonwealth the mere agent of the States to handle certain of *their* revenues and to have a dole for its work. The money appropriated from the Consolidated Revenue Fund was lawful expenditure, and judgment must be for the Commonwealth. O'Connor J.² also distinguished between a mere mercantile transaction and the adjustment of the rights under the Constitution of the States and the Commonwealth respectively. The Commonwealth was entitled in accordance with well-recognised methods of finance to accumulate revenue to be paid out later in the execution of some Commonwealth power. Isaacs J.³ was of opinion that it was a hopeless contention to claim that money which stood appropriated for a definite purpose and was not available for any other Commonwealth purpose was yet money which not only might but must be diverted from the Commonwealth and paid over irrevocably to the States. Higgins J.⁴ also held that expenditure covered money which had been appropriated for a definite purpose, but he was also prepared to hold that Parliament had the power of allowing contemplated expenditure to be debited, and had exercised that power even if ss. 89, 93, and 94 of the Constitution should mean that the States could only be debited with moneys actually paid.

The General Powers of the Parliament.—In all matters in which the question of the division of federal powers is not involved, the High Court has naturally tended to give to the powers conferred upon the Commonwealth a full and ample interpretation. Nevertheless, in the case of *Baxter v. Ah Way*,⁵ decided in May 1909, the old objection that *delegatus non delegare potest* was raised, though admittedly in a new form, and with a formal disclaimer of any desire to assert the validity of that maxim as applying to the powers of legislatures like the Commonwealth Parliament. Under s. 52, sub-s. (g) of the Customs Act, 1901, the Governor-General in Council was empowered to prohibit the importation of goods, and in virtue of that power he prohibited by a proclamation of December 29, 1905, the importation of opium in a condition suitable for smoking. The defendant was originally charged before a Court of summary jurisdiction with a breach of the proclamation, and the case came on the election of the prosecutor

¹ 7 C.L.R. 179, at pp. 191 *seq.*

² 7 C.L.R. 179, at pp. 197 *seq.*

³ 7 C.L.R. 179, at pp. 199 *seq.*

⁴ 7 C.L.R. 179, at pp. 203 *seq.*

⁵ [1909] 8 C.L.R. 626.

before the High Court, on a question of law submitted by Higgins J., before whom the case was being heard. The defendant claimed that the proclamation was *ultra vires*, as the sub-s. (g) of s. 52 of the Act was not within the power of the Commonwealth Parliament to enact. It was a delegation of the legislative power which was vested in Parliament by the Constitution and could not be delegated: that had been held in the American case of *Field v. Clark*.¹ It was true that the State and provincial Parliaments had authorised similar procedure, but then the States could, like the provinces of Canada, alter their constitutions, and had in effect done so by such legislation. The Court unanimously declined to accept this view of the powers of the Commonwealth: they laid stress on the declarations of the Privy Council in *Reg. v. Burah*,² *Hodge v. The Queen*,³ and *Powell v. Apollo Candle Co.*,⁴ which established the right of conditional legislation such as that actually exercised in this case, and it was pointed out by Isaacs J. that the State enactments were not alterations of the constitutions at all: though the States had power to alter their constitutions, that had to be done in accordance with the constitution itself as laid down in *Cooper v. Commissioner of Income Tax*,⁵ and could not be done by any ordinary law. The States had had power in customs matters to legislate as the Commonwealth had now done: it was clear that they had lost the power with the transfer of customs legislation to the sole control of the Commonwealth, and the Commonwealth must have the same power as they had exercised.

Similarly the High Court rejected, in the case of *Robtelmes v. Brennan*,⁶ the attempt to restrict the right of the Commonwealth Parliament to arrange for the deportation from Queensland of the Kanaka labourers whose removal from the Commonwealth had been finally decided upon. Under s. 8 of the Federal Pacific Labourers Act, 1901, a Court of summary jurisdiction, upon being satisfied that a Pacific Island labourer found in the Commonwealth before December 31, 1906, and reasonably supposed not to be employed under agreement, is not or has not been so employed for a month past, may order his deportation from Australia. Robtelmes was brought before a police magistrate, who declared himself so satisfied and ordered his deportation. He appealed from this order to the High Court. It was argued for him that the deportation of an alien friend was not authorised by any decision of the Privy Council, and that the case of *Attorney-General for Canada v. Cain*⁷ merely authorised the expulsion of an unauthorised immigrant. But this view was rejected by the Court. They admitted that the legislature of the Commonwealth could not make any laws which would have effect as laws beyond its own territorial limits,⁸ that is to say three

¹ 143 U.S. 649.² 3 App. Cas. 889.³ 9 App. Cas. 117.⁴ 10 App. Cas. 282.⁵ [1907] 4 C.L.R. 1304.⁶ [1906] 4 C.L.R. 395.⁷ [1906] A.C. 542.⁸ Cf. *Hughes v. Munro*, [1909], 9 C.L.R. 289, at p. 294, *per* Griffith C.J.

marine miles from the coast, except so far as its laws were in force on board ships trading between different ports of the Commonwealth.¹ But the same remark applied to the case of the Canadian labourers, in which the Privy Council had held that the deportation of the labourers from Canada was legal even though it involved the exercise of constraint beyond territorial limits. The legislation was therefore fully justified by the power to make laws as to immigration and aliens which the Commonwealth was given under the Constitution.

The Court evidently felt some difficulty in the position of the alien on deportation. They held, in accordance with the spirit though not the actual wording of the decision in the Canadian case, that the right of deportation covered the choice of destination, and was not confined to deportation to the home of the alien. But how was his detention in a ship on the high seas to be justified, when admittedly Commonwealth Acts did not operate on the high seas? The Chief Justice suggested that it may reasonably be assumed that every alien who chooses to come into a sea-girt country knows that he is liable to be deported, and that he can only be deported by sea, and that he therefore agrees as a term of his admission to the sea-girt country that such restraint may be exercised upon him beyond the territorial limits of that State as may be necessary for the purpose of his deportation. Regarded from this point of view the necessary restraint is made with his consent. This is an ingenious device for evading the difficulty that there is no legal authority for the detention on the high seas of a person who is thus being deported. It is probable, however, that the Courts, since the decision of the Privy Council in the case of the *Attorney-General for Canada v. Cain*,² will find that in such cases, as the beginning of the detention on board ship was clearly legal, the detention for the rest of the voyage will be legal also; but there remain serious difficulties if the detention is unnecessarily prolonged. For example, supposing it were proposed to deport a man from Australia to France, and he was taken thither via England. Would it be possible to justify his detention on board ship in an English harbour for the purpose of taking him to France?

It may be noted in the course of the argument of *McKelvey v. Meagher*³ the Chief Justice remarked that for the conveying of a fugitive offender back to the country from which he was a fugitive Imperial legislation would be necessary; in that case of course it is supplied by the Imperial Fugitive Offenders Acts, and so no difficulty would arise. In a later case—that of *Hughes v. Munro*⁴—the Chief Justice also laid it down that a statute must not be interpreted without grave cause to operate beyond territorial limits,

¹ See [1908] 5 C.L.R. 737.

² [1906] A.C. 542.

³ [1906] 4 C.L.R. 265, at p. 274.

⁴ [1909] 9 C.L.R. 289, at p. 294. This was one of the taxing cases, and the decision is of value as contrasting the powers of the States with those of the Canadian provinces under s. 92 of the British North America Act, 1867, on which cf. the cases cited in *Lovitt v. Rex*, 43 Can. S.C.R. 106.

though he left it open as to whether the limitation were an absolute one. As a matter of fact, it is clear from the powers given by the Commonwealth Constitution that the general restriction of the legislative authority of Parliament to the limits of the Commonwealth is qualified by certain exceptions; for example, s. 51 (x) empowers legislation for fisheries in Australian waters beyond territorial limits; s. 51 (xxx) empowers the Commonwealth to legislate as to the relations of the Commonwealth with the Islands of the Pacific; while s. 51 (vi) authorises legislation for the naval and military defence of the Commonwealth, and in the case of naval defence extra-territorial authority is essential if the law is to be effective, and both the Canadian and the Commonwealth Naval Defence Acts of 1910 assume power to legislate for the fleets beyond territorial limits. No doubt when that question comes to be discussed full effect will be given by the High Court to the principle laid down by the Privy Council in the case of *Cain*; and in this connection it may be mentioned that the Chief Justice of New Zealand has, despite criticism of English writers, reiterated his belief in the doctrine that a ship registered in New Zealand carries with it wherever it goes the law of New Zealand.¹ With this doctrine may be compared the principle enunciated by the High Court in the case of *The Merchant Service Guild of Australasia v. Archibald Currie & Co. Proprietary, Ltd.*,² which establishes that the interpretation of s. 5 of the Commonwealth of Australia Constitution Act is that the laws of the Commonwealth on the subjects on which it has power to legislate are in force on a British ship whose first port of clearance and destination are in the Commonwealth. A vessel registered in the Commonwealth might not comply with the conditions laid down in s. 5 of the Act, but the intention of the judgments in both the New Zealand and Commonwealth cases is clearly in favour of establishing the law of New Zealand and the Commonwealth as in force on ships which in common parlance might be called New Zealand or Australian vessels.

It is rather curious that the High Court should not have criticised the doctrine enunciated by the Privy Council in the Canadian case³ that the power of excluding aliens was a sovereign right which the Imperial Government could "delegate" to the Governor or the Government of one of the Colonies, either by a Royal Proclamation which has the force of a statute (*Campbell v. Hall*⁴), or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented. "If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown itself

¹ *Huddart Parker Proprietary (Limited) v. Nixon*, 29 N.Z.L.R. 657, at p. 663. See *In re the Award of the Wellington Cooks' and Stewards' Union*, 26 N.Z.L.R. 394, and cf. *Journ. Soc. Comp. Leg.*, No. 20, 1909, pp. 208 seq.; Harrison Moore, *Commonwealth of Australia*, 2nd ed. pp. 266-9.

² [1908] 5 C.L.R. 737.

³ 22 T.L.R. 757, at p. 758.

⁴ Cowp. 204.

could have exercised them." It is really impossible to accept this language as either accurate or consistent with the language of the Privy Council in the cases of *Reg. v. Burah* and the other cases above cited. The legislative powers of a colonial legislature are not delegated powers, however they are conferred. They are powers to legislate without restraint within the sphere of influence assigned by the instrument conferring the powers: the true statement of the case would rather seem to be that the right of excluding aliens is one which every nation possesses at international law, and the right of a colonial Parliament to exclude them is an exercise of the sovereign right of the country exercised by one of the modes of expression of the sovereign power. On this view the Imperial Parliament is no less an expression of the sovereign power than the colonial Parliament: neither can be said to have a delegated power, and to speak as the Privy Council seem to speak of the delegation of authority by assenting to an Act is a curious and almost unintelligible phrase. It is not perhaps without interest that The Hague Tribunal in the case of the North American fisheries dispute have clearly shown their recognition of the right of the three Parliaments of the United Kingdom, Canada, and Newfoundland to express the sovereign power of the Empire to make regulations regarding the fishery on the coast—a significant rejoinder to the attempts once pressed by the Government of the United States that the Imperial Parliament and Government alone could make regulations affecting the treaty rights of the United States in North America. But in all probability the decision of the Privy Council was not on this point of wording very carefully considered.

Incidentally, in the case of *Robtelmes*, the Chief Justice expressed doubt whether the executive of the Commonwealth or of any State could deport any person except under statutory authority, though the point was not necessary for the decision of the case. The same view was expressed by the Court in the case of *Brown v. Lizars*,¹ where it was decided that except under the authority of the Extradition Acts, and in accordance with the procedure therein laid down, the arrest of an alleged fugitive offender could not be permitted or justified.

While, however, the High Court has not hesitated to assert the wide powers of the Commonwealth Parliament within its sphere of action, and the freedom of the Parliament to choose such means as seem good to them, there are two vital limits set to the competence of the Commonwealth, one by the fact of the rights of the States to preserve their own powers, and one by the fact that the Commonwealth's powers are definitely restricted to certain named subjects and legislation incidental thereto. Even where no question of interference with the powers reserved to the States is involved, the High Court insists that the powers of the Parliament must not exceed the limits connoted by the ordinary sense of the words conferring on it legislative authority.

¹ 2 C.L.R. 836.

This point of view was brought out very clearly in the case of *Attorney-General for the Commonwealth v. Ah Sheung*,¹ decided in 1906, on appeal from the Supreme Court of Victoria. Ah Sheung was a Chinaman who had been naturalised in Victoria in 1883, and had acquired a domicile there. In 1901 he left the Commonwealth and proceeded to China, and on returning five years later he was refused admission under the terms of the Immigration Restriction Acts. His case came before a judge of the Victorian Supreme Court, who decided that he did not fall under the terms of the Acts, and on appeal the High Court upheld this view. They declined to accept the doctrine of a separate Australian nationality, so that while the term "immigration" would apply to other persons of British nationality it would not apply to persons of Australian nationality, whatever that might mean. But they thought that there was great force in the view that immigration was not a correct term to apply to the case of an Australian who was merely absent from Australia for a temporary purpose, though they were not then prepared to say whether residence or domicile would be the test of being an Australian.

The meaning of the term "immigration" was also considered in the case of *Chia Gee v. Martin*,² in which the High Court held that the term "immigrant" did not necessarily mean one who arrived in the Commonwealth with the intention of becoming a permanent resident, and that the particular provision of the Immigration Restriction Act under consideration dealt with entry into the Commonwealth.

In the later case of *Ah Yin v. Christie*³ the Court held that the power did not depend on the nationality of the person effected by its exercise, nor was it excluded by the fact that for purposes of civil status he was domiciled in Australia or in any part of it, and that therefore the child of a Chinaman, domiciled in Australia, who though not born in Australia was technically domiciled in the Commonwealth, might be a prohibited immigrant under the Commonwealth law. Griffith C.J. observed that the Commonwealth had, under the Constitution, power to exclude any person whether an alien or not, and he expressed the opinion that any person who sought to enter the Commonwealth from abroad was *prima facie* an immigrant within the meaning of the Immigration Restriction Act, but in that case also the Court refrained from deciding any of the points which were left unsettled in the previous cases.

The position of the High Court was further defined in 1908 in the case of *Potter v. Minahan*,⁴ which came before the Court on appeal from a Court of petty sessions of Victoria exercising federal jurisdiction. The magistrate found as facts that the defendant was born in Victoria, that his mother was an Australian, that his father was a Chinese, that he was brought up by his father and mother, and lived with them in Victoria until he was about

¹ [1906] 4 C.L.R. 949.

² [1905] 3 C.L.R. 649.

³ [1907] 4 C.L.R. 1428.

⁴ [1908] 7 C.L.R. 277.

five years old, that he was taken then to China by his father, who intended that he should return to Australia. He came to Australia, but was required to pass the dictation test. He said that he could not write what the officer read to him. The passage was not read again, and the officer told the defendant that he was a prohibited immigrant. An order *nisi* to review the decision of the magistrate was obtained by the informant Potter, a constable of police. It was urged for the appellant that the father of the defendant had never been domiciled in Victoria, and that in any case the defendant was an immigrant, and the fact that he had his domicile in Australia did not render him any less an immigrant, nor had his nationality anything to do with the question. For the defendant it was urged that the Acts were not intended to apply to Australian-born British subjects; it was most improbable that a community should pass an Act excluding members of that community unless on the most distinct terms. It had been decided in the United States that a citizen would not be excluded except in express terms. It was not necessary to claim that a man had a right to return to the country to which he owed allegiance, but Parliament would not be disposed to deny that right to a man except by express words or by necessary implication. The idea of immigration was quite foreign to a man coming back to his own country, and in the Acts of the Australian colonies before federation there was no provision purporting to exclude native-born Australians. It was also objected that the dictation test had not properly been applied. The majority of the Court decided that he was not an immigrant within the meaning of the Immigration Acts. Griffith C.J. held that the case could not be determined by the mere application of the rules either of nationality or of domicile. No doubt a British subject coming to the Commonwealth from another part of the Dominions might be an immigrant within the meaning of the Constitution. But anterior to the concepts of nationality and domicile was another which was an elementary part of the concept of human society, viz. the division of human beings into communities. Every human being was a member of some community, and was entitled in the part of the empire occupied by that community to a place to which he might resort when he thought fit. It had been held in the case of *Musgrove v. Chun Teeong Toy*¹ that an alien had no legal right to enter a country of which he was not a national, yet unless he was outlawed from human society he must be entitled to enter some community. At birth, in general, he was entitled to remain in the place where he was born; if his parents were then domiciled in some other place he perhaps acquired a right to go to and remain there. But until the right to remain there or return to his place of birth was lost it must continue, and he was entitled to regard himself as a member of the community who occupied that place. It was not necessary to consider whether he could lose his home by change of residence, and if so whether he could re-acquire it, or

¹ [1891] A.C. 272.

whether the right of entry extended to all the Dominions of the State of which he was a national. The return of such a person to his native land after temporary absence had never been described in the English language as immigration.

The respondent was entitled by the circumstances of his birth to regard Victoria as his home, and his return to the Commonwealth was not immigration within the meaning of s. 51 (xxvii) of the Constitution. He added that the first pattern of the Immigration Restriction Act of the Commonwealth was a Natal Act of 1887 (? 1897), and it would have been a singular thing if under that Act a Zulu who had gone to Johannesburg to work in the mines should have been regarded on his return to Natal as an immigrant.

Barton J.¹ held that the respondent's domicile of origin was that of his mother in Victoria, and that he had never changed his domicile since he had power to do so. His entry into the Commonwealth was a return home, and no one described a man returning home to his own country as an immigrant. The same view as to the right of a man to return to his home if he had not abandoned his intention of doing so after leaving Australia was asserted by O'Connor J.² He declined to accept the view that every person entering Australia was an immigrant. To do so would lead to the consequence that an Australian-born, whose actual permanent residence was in Australia, might be made subject to the dictation test on his return home after a month in New Zealand. He admitted that one part of the British Empire could exclude British subjects born in another part, and there was no Australian nationality in question between the British Empire and other nations. A person born in Australia, however, could only be excluded from Australia by an enactment in express terms or by necessary implication.

Isaacs J.³ held that neither British nationality nor an ideal Australian domicile could prevent a man from being an immigrant if it were distinctly proved that he had discontinued his practical identification with the inhabitants of the Commonwealth. The question was whether, notwithstanding any personal absence from Australia, a man could justly claim to regard the country as a place of habitation which he had never abandoned. It was not sufficient that a man should have been born in Australia, nor that he could claim an Australian domicile upon a theoretical reversion of his domicile of origin. In the case in question he thought that there was no proof that Minahan was really identified with Australia. All the probabilities showed, he thought, that he was destined by his father for life in China, and only gave it up when failing to be successful there. On the other hand, he held that the dictation test had not been properly applied.

Higgins J.⁴ also agreed that the dictation test had not been properly

¹ 7 C.L.R. 277, at pp. 291 *seq.*

² 7 C.L.R. 277, at pp. 299 *seq.*

³ 7 C.L.R. 277, at pp. 307 *seq.*

⁴ 7 C.L.R. 277, at pp. 317 *seq.*

applied, but he was also clear that there was no such thing as an Australian citizenship, and that the only thing was whether on the facts the man was an immigrant or not. He held that on the facts he was an immigrant.

In the case of the immigration power there is really no conflict with State legislation, though the decision of the High Court may render it necessary for the States to pass additional legislation regarding immigration, as Tasmania indeed has already done with a view of checking the immigration of criminals who would not fall under the scope of the Commonwealth legislation authorised by the Commonwealth. But in addition to the ordinary scrutiny of the validity of pretended exercises of the Commonwealth power, such as has been exhibited in the case of immigration, the High Court has felt bound to apply a still more jealous scrutiny in the case of Acts of the Commonwealth which, though they might fall under the mere language of the grant of power to the Commonwealth, would nevertheless be repugnant to the spirit of that enactment. The more obvious way of interpreting the Act which forms the Constitution would, at first sight, be merely to examine the terms of the enabling powers on the same principle as any grant of authority in any Act is examined, and accept as final the result of such examination. But the majority of the High Court as now constituted have adopted a different maxim of interpretation: they will not merely consider the question of normal interpretation, but will add to the criteria by which the language of the grant is measured the doctrines of the immunity of instrumentalities, and the doctrine of implied prohibition or reserved powers. These principles assert, briefly speaking, that neither a State instrumentality nor a Commonwealth instrumentality can be allowed to be interfered with by the Commonwealth or State respectively unless such interference is clearly expressed or implied in the Constitution; and secondly, that the Constitution is to be read as conferring upon the States exclusive authority in matters not assigned to the Commonwealth, so that such an interpretation must be placed on the Acts of the Commonwealth as will reserve to the States the powers which the Constitution intended to leave to them, unless there is clear evidence to show that the Commonwealth in any particular matter was intended to exercise a right contrary to the general reservation of power to the States.

(To be continued.)

THE INDIAN COUNCILS ACT, 1909.¹

[Contributed by SIR COURTENAY ILBERT, K.C.B., K.C.S.I.]

THE Indian Councils Act, 1909 (9 Ed. VII. c. 4), the passage of which will always be associated with the name of Lord Morley of Blackburn, made important changes in the constitution and functions of the Indian legislative councils, and gave power to make changes in the executive governments of the Indian provinces.

The introduction of the measure was preceded by discussions and correspondence, which began in Lord Morley's first year of office as Secretary of State for India, and extended over a period of nearly three years.

In 1906 the Viceroy, Lord Minto, drew up a minute in which he reviewed the political situation in India, and pointed out how the growth of education, encouraged by British rule, had led to the rise of important classes claiming equality of citizenship, and aspiring to take a larger part in shaping the policy of the government. He then appointed a committee of his council to consider the group of questions arising out of these novel conditions. From the discussion thus commenced was developed a tentative project of reform, which was outlined in a Home Department letter to local governments dated August 24, 1907. This letter, after having received approval by the Secretary of State in Council, was laid before Parliament, and was published in England and India.² The local governments to whom it was addressed were instructed to consult important bodies and individuals representative of various classes of the community before submitting their own conclusions to the Government of India. The replies were received in due course, and are to be found in the "colossal blue-books" appended to a letter from the Government of India, dated October 1, 1908, in which the situation is again reviewed, and revised proposals are formulated. The views of the Secretary of State on these proposals are expressed in a dispatch dated November 27, 1908,³ and were expounded by Lord Morley in a speech delivered in the House of Lords on December 17, 1908.

¹ This article is taken from a supplementary chapter to the second edition of the author's *Government of India*. The chapter, which contains corrections and additions, bringing the book up to date, was published by the Clarendon Press in 1910, and may be obtained either separately or bound up with the volume to which it is appended.

² East India (Advisory and Legislative Councils, etc.), 1907, Cd. 3710.

³ The letter of October 1, 1908, and the dispatch of November 27, 1908, are to be found in vol. i. of the blue-book entitled East India (Advisory and Legislative Councils, etc.), 1908, Cd. 4425. The replies from the local governments are embodied in separate volumes.

Reference was made to the subject in the King's Speech which ushered in the session of 1909, and in the debates on the address in reply. The Bill embodying the proposals of the Government, so far as they required Parliamentary authority, was presented by Lord Morley on February 17, 1909, and was read a second time, after a debate of two days, on February 24. It passed through committee on March 4, and was considered on report, read a third time, and passed by the House of Lords on March 9. In the House of Commons the Bill was read a second time on April 1, was considered in committee on April 19, and on April 26 was considered on report, read a third time, and passed with amendments. The Commons' amendments were considered on May 4 and agreed to with an important modification which was accepted by the Commons. The Act thus passed received the Royal Assent on May 25, 1909.

The only important change in the Bill during its passage through Parliament related to the creation of executive councils for provinces under lieutenant-governors. Clause 3 of the Bill as introduced enabled the Governor-General in Council, with the approval of the Secretary of State in Council, by proclamation, to create an executive council for any such province. This clause was struck out by the House of Lords, restored by the House of Commons, and eventually agreed to in the modified form in which it now stands as s. 3 of the Act.

In the course of the debates on the Bill much was said about Lord Morley's announcement of his intention to appoint a native of India to a post on the Governor-General's council. This subject was not strictly relevant to the Bill, because, as was explained, the power of making these appointments is free from any restriction as to race, creed, or place of birth. Effect was given to Lord Morley's intention by the appointment of Mr. Sinha, in March 1909, to the post of law member of the Governor-General's council. This appointment carried a step further the policy adopted in 1907, when two natives of India were placed on the Secretary of State's council. In pursuance of the same policy a native of India has been placed on the executive councils for Madras and Bombay respectively, and is to be placed on the new executive council for Bengal.

Under s. 1 of the Act the "additional" members of the Indian legislative councils, *i.e.* those other than the members of the executive councils, must, instead of being all nominated, include elected members.

By s. 2 power is given to raise the number of members of the executive councils for Madras and Bombay to a maximum of four, of whom two at least must be persons who at the time of their appointment have been in the service of the Crown in India for at least twelve years.

Under s. 3 there is power to constitute an executive council for any province having a lieutenant-governor. But, except in the case of Bengal, the draft of any proclamation proposed to be made in pursuance of this power must be laid before each House of Parliament, and the proclamation may be

disallowed in pursuance of an address from either House. The number of the executive council must not exceed four.¹

S. 4 requires the appointment of vice-presidents of the several councils.

By s. 5 the Governor-General in Council, the governors in council of Madras and Bombay, and the lieutenant-governors or lieutenant-governors in council of other provinces are required to make rules authorising at any meeting of their respective legislative councils the discussion of the annual financial statement, and of any matter of general interest, and the asking of questions.

Under ss. 1 and 6 there is extensive power to make regulations for carrying the Act into effect.

And under s. 7 certain proclamations, regulations, and rules are required to be laid before Parliament when made.

It will be seen that the provisions of the Act of 1909 are, as is usual in Acts relating to India, couched in wide and general terms, leaving all details, and some important matters of principle, to be determined by regulations and rules made by the authorities in India.

The regulations and rules required to give effect in the first instance to the Act of 1909 are to be found in a blue-book which was laid before Parliament in pursuance of s. 7 of the Act.²

The blue-book begins with a notification fixing November 15, 1909, as the date at which the provisions of the Act were to come into operation.

Then follow, under the headings Nos. II. to IX., regulations and rules for the nomination and election of the members of the several legislative councils of India, other than those who are such members by virtue of being members of the executive councils. The regulations are, in the case of each council, of a general character, and relate to such matters as number, qualifications, term of office, and mode of filling vacancies. The rules, which are scheduled to the regulations, are more detailed, and prescribe the mode in which the several elections are to be made.

In No. X. are to be found important rules regulating the business of the Governor-General's legislative council, and relating to (1) the discussion of the annual financial statement, (2) the discussion of matters of general public interest, and (3) the asking of questions.

No. XI. is a Home Department resolution of the Government of India, dated November 15, 1909, which describes in general terms the nature of the changes made by the Act of 1909, and the regulations under it, and has appended to it a table showing the constitutions of the several legislative councils.

The changes made in the legislative councils by the Act of 1909, and the regulations and rules under it, may be considered under the heads of (a) Constitution and (b) Functions.

¹ An executive council of three members is being constituted for Bengal.

² East India (Executive and Legislative Councils) Regulations, etc., for giving effect to the Indian Councils Act, 1909 (1910, Cd. 4987).

A.—CONSTITUTION.

The constitution of the councils is changed in three respects :

1. Numbers ;
2. Proportion of official and non-official members ;
3. Methods of appointment or election.

1. NUMBERS.

The Indian Councils Act, 1892, increased the size of the legislative councils constituted under the Act of 1861. The maximum of additional members was raised from 12 to 16 in the Governor-General's council, and from 8 to 20 in the Madras and Bombay councils. The limit of number of the Bengal council was raised to 20, that of the United (then North-Western) Provinces to 15. The Punjab and Burma obtained legislative councils in 1897, and Eastern Bengal and Assam in 1905, the maximum strength being fixed at 15 in the first two, and 20 in the third.

These numbers are now doubled or more than doubled. The additional members of the Governor-General's council are to be not more than 60, the additional members of the councils of Madras and Bombay, and the members of the councils of Bengal, the United Provinces, and Eastern Bengal and Assam, are to be not more than 50. In Punjab and Burma the maximum is raised to 30. In computing the number of members of the Governor-General's council, 8 must be added to the "additional" members, namely, the 6 ordinary members of the executive council, the commander-in-chief, and the lieutenant-governor of the province in which the council sits. Similarly there are now on the Madras and Bombay legislative councils 4 *ex-officio* members, namely, in each case, the 3 members of the executive council and the advocate-general; and on the Bengal legislative council there will be the 3 ordinary members of the new executive council.

Thus the actual strength of the legislative councils under the new law is as follows :¹

Legislative Council of—	Number under Regulations of 1909.	Maximum number under Act of 1909.
India	68	68
Madras	48	54
Bombay	48	54
Bengal	53	53
United Provinces	48	50
Eastern Bengal and Assam	42	50
Punjab	26	30
Burma	17	30

¹ Excluding in each case the head of the Government, *i.e.* the Governor-General, Governor, or Lieutenant-Governor.

2. PROPORTION OF OFFICIAL AND NON-OFFICIAL MEMBERS.

Under the Act of 1861 at least one-half of the additional members of the legislative councils of the Governor-General's council and the councils of Madras and Bombay, and at least one-third of the members of the other legislative councils, must be non-official. An official majority was not required by statute, but in practice was always maintained before the Act of 1909, except in Bombay, where the official members had been for some years in a minority.

Under the regulations of 1909 there must be an official majority in the Governor-General's legislative council, and a non-official majority in all the other legislative councils. The existing proportions, as fixed by the regulations, are as follows:

Legislative Council of—	Officials.	Non-Officials.	Majority.
India	36	32	Official. 4 Non-official. 6
Madras	20	26	10
Bombay	18	28	11
Bengal	20	31	6
United Provinces	20	26	6
Eastern Bengal and Assam.	17	23	4
Punjab	10	14	3
Burma	6	9	

These figures exclude in each case the head of the government, *i.e.* the Governor-General, Governor, or Lieutenant-Governor. They also leave out of account the two "expert" members who may be appointed from time to time as occasion requires, and who may be either official or non-official.¹ Any alteration in the number of the executive council would affect the proportions.

It will be observed that these proportions are fixed by the regulations, not by statute. They were so picked in pursuance of the policy announced by the Secretary of State, who was of opinion that while it was necessary to maintain an official majority in the Governor-General's council, this was not necessary or desirable in the case of the other councils. Refusal by the provincial councils to pass necessary legislation may be met by exercise of the power vested in the Governor-General's council to legislate for any part of India. Undesirable legislation may be checked by the power of veto reserved to the head of the Government.

¹ There is no provision for the appointment of experts, as such, on the Governor-General's legislative council, but experts could be placed on the council, when occasion requires, under his powers of nominating members.

3. METHODS OF APPOINTMENT OR ELECTION.

Under the Act of 1861 the "additional" members of the legislative councils were nominated by the Governor-General, Governor, or Lieutenant-Governor, the only restriction on his discretion being the requirement to maintain a due proportion of unofficial members.

By the Act of 1892 the nominations were required to be in accordance with regulations made by the Governor-General in Council and approved by the Secretary of State. Under the regulations so made a certain number of these nominations had to be made on the recommendation of specified persons, bodies, and associations, the intention being to give a representative character to the persons so nominated. There was no obligation to accept the recommendation, but in practice it was never refused. In the case of other nominations regard was to be had to the due and fair representation of the different classes of the community.¹ Under the Act of 1909 the additional members must include not only nominated members, but also members elected in accordance with regulations made under the Act, and the regulations of November 1909 give effect to this requirement.

There is a separate set of regulations for every legislative council, and scheduled to each set are detailed rules as to the method of election.

The provisions of the regulations themselves are of a more general character, and those framed for the Governor-General's council may be treated as typical.

They begin by fixing the number of "additional" members, classifying them as elected or nominated, describing in general terms the classes or bodies by whom the elected members are to be elected, and defining by reference to the schedules the constitution of the electorate and the method of election.

The substitution of a system of election for a system of nomination obviously involves the imposition of certain disqualifications for election. These qualifications are laid down for the Governor-General's council by Regulation IV., which provides that—

No person shall be eligible for election as a member of the Council if such person

- (a) is not a British subject ; or
- (b) is a female ; or
- (c) has been adjudged by a competent civil Court to be of unsound mind ; or
- (d) is under twenty-five years of age ; or
- (e) is an uncertificated bankrupt or an undischarged insolvent ; or
- (f) has been dismissed from the Government service ; or

¹ See *Government of India*, pp. 115, 116, 119.

- (g) has been sentenced by a criminal Court to imprisonment for an offence punishable with imprisonment for a term exceeding six months, or to transportation, or has been ordered to find security for good behaviour under the Code of Criminal Procedure, such sentence or order not having subsequently been reversed, or remitted, or the offender pardoned; or
- (h) has been debarred from practising as a legal practitioner by order of any competent authority; or
- (i) has been declared by the Governor-General in Council to be of such reputation and antecedents that his election would, in the opinion of the Governor-General in Council, be contrary to the public interest.

But in cases (f) (g) (h) and (i), the disqualification may be removed by an order of the Governor-General in Council in that behalf.

Identical provisions are embodied in all the other sets of regulations, except that the powers exercisable by the Governor-General in Council may be exercised by the Governor in Council or Lieutenant-Governor.

The positive qualifications both of electors and of candidates are fixed by the scheduled rules, but by the regulations females; minors, and persons adjudged to be of unsound mind are disqualified from voting.

Every person elected or nominated must, before taking his seat, make an oath or affirmation of his allegiance to the Crown.

The ordinary term of office of an "additional" member, whether nominated or elected, is three years. But official members and members nominated as being persons who have expert knowledge of subjects connected with proposed or pending legislation are to hold office for three years or such shorter period as the Governor-General may at the time of nomination determine. A member elected or nominated to fill a casual vacancy sits only for the unexpired portion of his predecessor's term. The effect of these provisions, which are repeated in substance in all the sets of regulations, is that for elected members of the legislative councils there must be a general election every three years.

The regulations provide for declaring seats vacant, for choice or determination of seat in case of a candidate elected by more than one electorate, and for the case of failure to elect.

An election is declared to be invalid if any corrupt practice is committed in connection therewith by the candidate elected, and provision is made for the determination of disputes as to the validity of elections.

The elaborate rules scheduled to the regulations under the Act of 1909 show the number and diversity of the electorates to the legislative councils, and the variety of methods adopted for constituting the electorates, and for regulating their procedure in elections. The object aimed at was to obtain, so far as possible, a fair representation of the different classes and interests in the country, and the regulations and rules were framed for this

purpose in accordance with local advice, and with reference to the local conditions of each province. The consequent variety of the rules makes it impossible to generalise their provisions or to summarise their contents. All of them may be regarded as experimental, some of them are avowedly temporary and provisional. For instance, it has not yet been found practicable to constitute satisfactory electorates (1) for the representatives of Indian commerce, except in the Bombay council, (2) for the representatives of the Punjab landholders and Muhammadans on the Governor-General's council, or (3) for the representative of the planting community on the Bengal council. Under the existing regulations each of these interests is represented by nominated members, but election is to be substituted for nomination as soon as a workable electorate can be formed.

The most difficult of the problems to be faced was the representation of Muhammadans, who claimed to be represented as a separate class or community. This problem has been attacked in various ways. One method adopted is a system of rotation. The representative of the Bombay landholders on the Governor-General's council was elected at the first, and is to be elected at the third and subsequent alternate elections, by the landholders of Sind, a great majority of whom are Muhammadans, while at other elections he is to be elected by the Sardars of Gujerat or the Sardars of the Deccan, a majority of whom are Hindus. In the Punjab the numbers of the Muhammadan and non-Muhammadan landholders are about equal and the representative of this constituency is expected to be alternately a Muhammadan and a non-Muhammadan. When these two seats, the Bombay seat and the Punjab seat, are held by non-Muhammadans, there are to be two members elected by special electorates consisting of Muhammadan landholders in the United Provinces and in Eastern Bengal and Assam respectively.

In some provinces there are special interests, such as the tea and jute industries in Eastern Bengal and Assam, and the planting communities in Madras and Bengal, for whom special provision has been made.

The representation of smaller classes and minor interests will have to be met by nomination, in accordance with the needs of the time and the importance of different claims.

Where the electorates are scattered, as in the case of the landholders and the Muhammadans, provision is made for the preparation and publication of electoral rolls containing the names of all persons qualified to vote.

The qualifications prescribed for electors in the case of landholders and Muhammadans vary greatly from province to province. Landholders must usually possess a substantial property qualification. In some cases titles and honorary distinctions, fellowships of Universities, and pensions for public service are recognised as qualifications.

The qualifications for candidates are, as a rule, the same as those for electors, but in some cases, where such restrictions would be inappropriate,

her qualifications are prescribed. Thus a person elected to the Governor-General's council by the unofficial members of a provincial council is required to have a place of residence within the province, and such practical connection with the province as qualifies him to represent it. The election is either direct, or indirect through elected delegates. In some cases the electors or delegates vote at a single centre before a returning officer, in others they vote at different places before an attesting officer, who dispatches the voting paper to the returning officer.

In Bengal each delegate has a varying number of votes, the number depending in the case of district boards and municipalities on the income of these bodies, and in the case of the Muhammadan community on the strength and importance of the Muhammadan population of a district or group of districts. Elsewhere the same object has been obtained by varying the number of delegates on like grounds, each delegate then having one vote.

The member of the Governor-General's council chosen to represent the Muhammadan community of Bombay is elected by the Muhammadan members of the Bombay council. The Government of India were assured that this method would secure better representation than election by delegates *ad hoc*.

The procedure for voting is generally similar to that prescribed by the English Ballot Act. But in some cases, such as the elections by the corporations of the presidency towns, the chambers of commerce and the trade associations, the voting is regulated by the procedure usually adopted by these bodies for the transaction of their ordinary business.

B.—FUNCTIONS.

The functions of the legislative councils fall into three divisions, (a) legislative, (b) deliberative, and (c) interrogatory.

(a) LEGISLATIVE.

The Act of 1909, and the regulations under it, make no alteration in the legislative functions and powers of the provincial councils. These are still mainly regulated by the Act of 1861.¹

(b) DELIBERATIVE.

Between 1861 and 1892 the powers of the legislative councils were confined strictly to legislation.² The Act of 1892 introduced non-legislative functions by empowering the head of the government in every case to make rules authorising the discussion of the annual financial statement, provided that no member might propose a motion or divide the council. Under this

¹ See Digest, ss. 63-7, 76-8.

² See Digest, ss. 64, 77.

power one or two days were allotted annually in every council to the discussion of a budget already settled by the executive government.

The Act of 1909 repealed the provisions of the Act of 1892 on this point and required rules to be made authorising at any meeting of the legislative councils the discussion of the annual financial statement and of any matter of general public interest.¹

The rules made under this direction introduce two important changes :

(i) The discussion of the budget is to extend over several days, it takes place before the budget is finally settled, and members have the right to propose resolutions and to divide the council upon them :

(ii) At meetings of the legislative councils matters of general public importance may be discussed, and divisions may be taken on resolutions proposed by members.

In each case the resolutions are to take the form of recommendations to the government, and the government is not bound to act upon them.

The rules framed for the Governor-General's council are printed in the blue-book of 1910,² and are of much interest and importance.³ It may be useful to summarise here some of their leading provisions.

Financial Statement or Budget.—The rules distinguish between the financial statement and the budget. The first means the preliminary financial estimates of the Governor-General in Council for the financial year next following. The second means the financial statement as finally settled by the Governor-General in Council. On a day appointed in each year by the Governor-General, the financial statement, with an explanatory memorandum, is to be presented to the council by the finance member, and a printed copy is to be supplied to each member. No discussion takes place on this day.

The first stage of discussion takes place on a subsequent day after the finance member has made any explanations he thinks necessary. On this day any member may move any resolution entered in his name in the list of business relating to any alteration in taxation, new loan, or additional grant to local governments proposed or mentioned in the financial statement or explanatory memorandum, and a discussion takes place on any resolution so moved.

The second stage of discussion begins after these resolutions have been disposed of. The member of council in charge of a department explains the head or heads of the financial statement relating to his department, and resolutions may then be moved and discussed.

The range of discussion is subject to important restrictions. There is a schedule to the rules defining which heads of the financial statement are open to or are excluded from discussion. Among the excluded heads are military,

¹ 8 Edw. VII. c. 4, s. 5.

² 1910, Cd. 4987.

³ The rules for the other councils are not included in the blue-book, but are framed on similar lines.

political, and purely provincial affairs, under the heading "revenue," stamps, customs, assessed taxes, and courts, and, under the heading "expenditure," assignments and compensations, interest on debt, ecclesiastical expenditure, and state railways. Besides these the rules themselves exclude from discussion any of the following subjects :

- (a) Any subject removed from the discussion of the Governor-General's legislative council by s. 22 of the Indian Act, 1861 ;¹
- (b) Any matter affecting the relations of His Majesty's Government or of the Governor-General in Council with any foreign State or any native State in India ; or
- (c) Any matter under adjudication by a court of law having jurisdiction in any part of His Majesty's dominions.

Any resolution moved must comply with the following conditions :

- (a) It must be in the form of a specific recommendation addressed to the Governor-General in Council ;
- (b) It must be clearly and precisely expressed and must raise a definite issue ;
- (c) It must not contain arguments, inferences, ironical expressions, or defamatory statements, nor refer to the conduct or character of persons except in their official or public capacity ;
- (d) It must not challenge the accuracy of the financial statement ;
- (e) It must be directly relevant to some entry in the financial statement.

Two clear days' notice of any resolution must be given. The president may disallow any resolution or part of a resolution without giving any reason other than that in his opinion it cannot be moved, or that it should be moved in a provincial council, and his decision cannot be challenged.

The budget as finally settled must be presented to the council on or before March 24 by the finance member, who then describes any changes made in the figures of the financial statement, and explains why any resolutions passed by the council have not been accepted. No discussion takes place on this day, but on a subsequent day there is to be a general discussion at which observations may be made, but resolutions may not be moved. Nor is the budget as a whole to be submitted to the vote of the council.

Many of the rules for regulating procedure in debate are of a kind with which members of the House of Commons are familiar, but some of them present distinctive features. No speech may exceed fifteen minutes, except those of the mover and the member in charge, who may speak for thirty minutes. Any member may send his speech in print to the secretary not less than two clear days before the day fixed for the discussion of a resolu-

¹ *I.e.* matters which the Governor-General in Council has not power to repeal or affect by any law. See Digest, s. 63.

tion, with as many copies as there are members, and one copy is to be supplied to every member. Any such speech may at the discretion of the president be taken as read.

Matters of General Public Interest.—Discussions on these matters must be raised by resolution, and must take place after all the other business of the day has been concluded. The general rules regulating the form of the resolutions, and the discussions upon them, are, in the main, the same as those for the discussion of resolutions on the financial statement, the chief difference being that the range of discussions is wider and that amendments are allowed. The only subjects specifically excluded from discussion are those belonging to the three classes mentioned above in connection with the financial statement, namely, matters for which the councils cannot legislate, matters relating to foreign and native States, and matters under adjudication by a court of law. But the president has the same discretionary power of disallowing resolutions as he has in the case of resolutions on the financial statement.

The right to move amendments on resolutions is made subject to restrictions which are intended to provide safeguards against abuse of the right. Fifteen days' notice of a resolution is required, and priority depends on the time of receipt. When a question has been discussed, or a resolution has been disallowed or withdrawn, no resolution or amendment raising substantially the same question may be moved within one year.

(c) INTERROGATORY.

Since 1892 members of the legislative councils have had the right to ask questions under conditions and restrictions prescribed by rules. This right is now enlarged by allowing a member to put a supplementary question "for the purpose of further elucidating any matter of fact regarding which a request for information has been made in his original question." But the president may disallow a supplementary question, and the member to whom it is addressed may decline to answer it without notice. The rules which now govern the asking of questions in the Governor-General's council are printed in the blue-book of 1910.

The quorum for the transaction of business, legislative or other, at meetings of the Governor-General's legislative council is fixed by one of the regulations of November 15, 1909, for the constitution of that council. Regulation XIII. provides that, in addition to the Governor-General, President, Vice-President, or other member appointed to preside, there must be present fifteen or more members of the council, of whom eight at least must be additional members. There are similar provisions in the regulations for the other councils.

NOTES ON THE PRESUMPTIONS OF DEATH AND SURVIVORSHIP IN ENGLAND AND ELSEWHERE.

[Contributed by H. A. DE COLYAR, ESQ., K.C.]

THESE notes deal briefly, but not exhaustively, from the point of view of comparative jurisprudence (i) with the presumption of the fact of death from long absence, where there is no direct evidence of death, and (ii) with the presumption of survivorship amongst persons who have perished in a common disaster.

I. THE PRESUMPTION OF DEATH FROM LONG ABSENCE.

In England.¹—There is no presumption *of law* in favour of the continuance of life, which is altogether a matter of evidence in each case.² There is, however, a disputable presumption *of fact* in favour of the continuance of life for any reasonable time after a person has been last heard of,³ and, where the issue is on the life or death of a person who is proved to have once existed, the onus is on the party asserting the death.⁴ In the case, however, of a person who has not been heard of for seven years by those who would naturally have received intelligence of or from him, had he been alive, or after search

¹ Includes Ireland.

² *In re Phene's Trusts*, (1869) L.R. 5 Ch. App. 139; see also *In re Aldersey—Gibson v. Hall*, (1905) 2 Ch. 181; *In re Green's Settlement*, (1865) L.R. 1 Eq. 288; *Lapsley and others v. Grierson*, (1848) 1 H.L. Cas. 498; *The Queen v. Lumley*, (1869) L.R. 1 C.C.R. 195; *In re the Goods of Connor*, (1892) 29 L.R. Ir. 261. There are, unquestionably, *dicta* and decisions (see *In re Benham's Trusts*, 1867, L.R. 4 Eq. 416; *Thomas v. Thomas*, 1864, 2 Dr. & Sm. 298, 303; *per Lord Coleridge C.J. in R. v. Willshire*, 1881, 6 Q.B.D. 366; *per Lord Denman C.J. in Nepean v. Doe d. Knight*, 1837, 2 M. & W. at p. 913; *per Lord Ellenborough C.J. in Doe v. Jesson*, 1805, 6 East. at p. 851; *Hopwell v. De Pinna*, 1809, 2 Camp. 113; *In re Rhodes—Rhodes v. Rhodes*, 1887, 36 Ch.D. 584; Taylor on Evidence, 10th ed. vol. i. pp. 192 *et seq.*) to the effect that until seven years have elapsed since a person was last heard of, the continuance of life must be presumed (*per Curiam in In re the Goods of Connor*, 1892, 29 L.R. Ir. at p. 264). This doctrine, imported from the civil law, has, however, been conclusively overruled (*ibid.*; and see *In re Phene's Trusts*, *supra*).

³ *In re the Goods of Connor*, *supra*; *In re Phene's Trusts*, *supra*.

⁴ *Wilson v. Hodges*, (1802) 2 East. 312; *Watson v. King*, (1815) 1 Stark. 121; *Throgmorton v. Walton*, (1624) 2 Roll. Rep. 461; *per Lord Denman C.J. in Nepean v. Doe d. Knight*, (1837) 2 M. & W. at p. 913; *In re Corbishley's Trusts*, (1880) 14 Ch.D. 846; *M'Mahon v. M'Elroy*, (1869) Ir. Rep. 5 Eq. 1.

has been ineffectually made to find him,¹ there arises a presumption of law that he is dead,² in the absence of circumstances negating such presumption and satisfactorily accounting for his absence and silence.³ This presumption of death depends wholly upon the length of the unexplained absence, without news of the absentee, and not at all on his age. Death will not, therefore, be presumed merely because the birth of the absentee occurred so long ago that, to assume continued existence, would be preposterous, having regard to the ordinary duration of human life.⁴

This period of seven years, which, it may be mentioned, gives rise to the presumption of death, not only where persons have gone abroad, but also where the absence is from a person's usual place of resort,⁵ has been adopted from analogy to the statute 1 Jac. I. c. 11, s. 2,⁶ relating to bigamy, and to a still unrepealed statute (19 Car. II. c. 16) relating to the continuance of lives on which leases are held.⁷ Whether, in these days of rapid and constant communication between all parts of the world, and swift dissemination of news by telegraph, the presumption of death might not without injustice be, in ordinary cases, raised after the lapse of a somewhat shorter period than seven years, is a question in regard to which opinions will probably differ. In probate cases, however, it is to be noticed that where it is sought to presume death for purposes of administration on the ground merely of lapse of time, the Court is not bound by any hard-and-fast

¹ See *Doe d. France v. Andrews*, (1850) 15 Q.B. 756.

² *Doe d. Knight v. Nepean*, (1833) 5 B. & Ad. 86; S.C. in Exch. Ch. 2 M. & W. 894, 914; *In re Creed*, (1852) Drew. 235; *Gibson v. Hall*, (1905) 2 Ch. 181; *Williams and others v. Scottish Widows' Fund Life Insurance Co.*, (1888) 4 T.L.R. 489; *Thorne v. Rolfe*, (1559) Anders. 20; *Webster v. Birchmore*, (1807) 13 Ves. 362; *Doe d. Banning v. Griffin*, (1812) 15 East. 293; *Lee v. Willcock*, (1802) 6 Ves. 605; *Rust v. Baker*, (1837) 8 Sim. 443; *In re Rhodes—Rhodes v. Rhodes*, (1887) 36 Ch.D. 586; *In re Benjamin—Neville v. Benjamin*, (1902) 1 Ch. 723.

³ See *Watson v. King*, (1844) 14 Sim. 28; *Bowden v. Henderson*, (1854) 2 Sm. & G. 360; *Lakin v. Lakin*, (1865) 34 Bean. 443. The death of a defaulting solicitor was, however, presumed, after seven years' absence, although he absconded and would therefore be anxious to conceal his identity and whereabouts (*Wells v. Palmer*, 1905, 53 W.R. 169).

⁴ *Atkins v. Warrington*, 1 Chit. Plead. 6th ed. 258, where the Court refused to assume judicially that a person alive in the year 1034 was not still living in the year 1827. See also *Benson v. Olive*, (1732) 2 Str. 920; Best on *Presumptions of Law and Fact*, p. 190. It will be seen, *post*, that many of the contemporary Codes Civil presume death after a prescribed period of years (sometimes one hundred, sometimes less) have elapsed since the birth of an absent person.

⁵ See *Dunn v. Snowden*, (1862) 2 Dr. & Sm. 201; *Doe d. Lloyd v. Deakin*, (1821) 4 B. & Ald. 433; *Bailey v. Hammond*, (1802) 7 Ves. 590; *Roe v. Hasland*, (1762) 1 W. Black. 404; Best on *Presumptions of Law and Fact*, p. 191.

⁶ Repealed, but re-enacted, in the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57.

⁷ *Per Littledale J. in R. v. Harborne*, (1835) 2 Ad. & El. at p. 546; see also *Doe v. Jesson*, (1805) 6 East. at p. 85; *Nepean v. Doe d. Knight*, (1837) 2 M. & W. at pp. 912, 913; *In re Pople—Ex parte Baker*, (1889) 40 Ch.D. 589.

rule as to the necessity of the expiration of seven years, though it may adopt the rule as a matter of caution,¹ and certainly regards it as a fair ground, in most cases, for presuming death,² which, however, will not be presumed, even after the lapse of twenty-five years, until the Court is satisfied that it has before it the best evidence that can reasonably be obtained on the subject,³ it being a general rule of practice in the Probate Division that no death shall be presumed merely on the ground that the supposed deceased has disappeared for many years, and is probably dead.⁴ On the other hand, death will, even in probate cases, sometimes be presumed, as where there has been a shipwreck, involving loss of life,⁵ after a comparatively short period (e.g. two years) has elapsed since the supposed deceased was last heard of.⁶ Moreover, the Probate Division will usually accept a grant, made by a foreign Court of competent jurisdiction, on the presumption of the testator's or intestate's death, as sufficient proof of death, without requiring the fact to be established by independent evidence.⁷

Though the Court of Chancery will act upon the general rule that a man's death is to be presumed after seven years' unexplained disappearance, the rule admits of exceptions, and the Court is bound to consider the circumstances of each particular case, in order to see whether the presumption is rebutted, or rather whether it fairly arises.⁸ In some circumstances death will be presumed in the Chancery Division after less than seven years have elapsed since a person has been last heard of.⁹

¹ *In the Goods of Winstone*, (1898) P. 143.

² *In the Goods of Elizabeth How*, (1858) 1 Sw. & Tr. 53; *In the Goods of Peck*, (1860) 2 Sw. & Tr. 506; *In the Goods of Turner*, (1864) 3 Sw. & Tr. 476.

³ *In the Goods of Robertson*, (1896) P. 8; *In the Goods of Clarke*, (1896) P. 287.

⁴ *In the Goods of Robertson*, (1895) 65 L.J.P. 16. Where the death of a deceased is presumptive, the Probate Court gives the applicant leave to swear the death and the facts must be deposed to (*Re Jackson*, 1903, 87 L.T. 747).

⁵ For the practice in probate cases for obtaining an order for presumption of death, where persons are supposed to have been lost at sea, *vide* Tristram & Coote's *Probate Practice*, 14th ed. p. 272. *In the Goods of Sir Claude Robert Campbell, Bt.*, (1910) *Times*, Oct. 25, p. 3. *In the Estate of Walker*, (1909) P. 115, administration was granted to the creditors of a man who was missed from a cross-Channel steamer when four miles from the port of arrival, on proof of circumstances, and notice to his widow and daughter, who had refused to take out administration as they believed him to be alive.

⁶ *In the Goods of Norris*, (1858) 1 Sw. & Tr. 6; *In the Goods of Bishop*, (1859) 1 Sw. & Tr. 303, S.C. 28 L.J.P. 93; *In the Goods of Main*, (1858) 1 Sw. & Tr. 11; *In the Goods of Dodd*, (1897) 77 L.T. 137.

⁷ *In the Goods of Spenceley*, (1892) P. 255. The Probate Division will not, as a rule, give leave to presume the death of a person other than the one whose estate is in question: *In the Goods of Clark*, (1888) 15 P.D. 10. If the whole of a deceased's estate does not exceed £100, the order for presumption of death can be made by one of the Probate Registrars (Tristram & Coote's *Probate Practice*, 14th ed. p. 272).

⁸ *M'Mahon v. M'Elroy*, (1869) 5 Ir. R. Eq. 1; see also *Hickman v. Upsall*, (1876) 4 Ch.D. 144; *Dobson v. Pattinson*, (1857) 12 Jur. N.S. 1202; *Grissall v. Stilfox*, (1845) 9 Jur. 890.

⁹ See *In re Beasley Trusts*, (1869) L.R. 7 Eq. 498; *Lakin, v. Lakin*, (1865) 34 Beav. 443; *Hickman v. Upsall*, (1875) L.R. 20 Eq. 136; *Sillick v. Booth*, (1841) 1 You. & Coll. C.C. 117; *Danby v. Danby*, (1859) 5 Jur. N.S. 54.

The Merchant Shipping Act, 1894,¹ provides that, in any proceedings by the Board of Trade for the recovery of wages due to seamen lost with their ship, if it is shown by evidence that the ship has twelve months or upwards before the institution of such proceedings left the port of departure, she shall, unless it is shown that she has been heard of within twelve months after that departure, be deemed to have been lost, with all hands on board, either immediately after the time she was last heard of, or at such later time as the Court hearing the case may think probable.² This particular presumption is, however, available only in the matters to which the enactment relates, namely, the recovery of seamen's wages.

Absence for any length of time is not *per se* a ground of divorce in England, though desertion by a husband, without reasonable excuse, for two years and upwards, coupled with adultery, entitles a wife to a dissolution of the marriage,³ while his desertion alone for a like period is a ground for a judicial separation.⁴ On the other hand, a second marriage by either spouse, where the other has been continuously absent for the last seven years, is not felonious, unless contracted with knowledge that the absent spouse was living within that time.⁵ Moreover, when, upon a trial for bigamy, it is proved that the prisoner and the absent spouse have lived apart for the seven years preceding the second marriage, the onus is upon the prosecution to show that during that time the prisoner was aware of the absent spouse's existence.⁶

There is no presumption of law, in England, as to *the time* of the death of a person whose death from long absence is presumed, it being for a jury to determine the question upon the particular facts of each case.⁷ It is indeed often a matter of complete uncertainty at what point of time, during the seven years, the absentee died, and, of all the points of time, the last day is certainly the most improbable and the most inconsistent with the ground for presuming the fact of death, as the presumption of such fact seems rather to lead to the conclusion that death took place some considerable

¹ 57 & 58 Vict. c. 60.

² *Ibid.* s. 174 (2).

³ The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 27.

⁴ *Ibid.* s. 16.

⁵ The Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57.

⁶ *The Queen v. Curgerwen*, (1865) L.R. 1 C.C.R. 1; *The Queen v. Tolson*, (1889) 23 Q.B.D. 168.

⁷ *Doe d. Knight v. Nepean*, (1833) 5 B. & Ad. 86; S.C. (in Exch. Ch.), (1837) 2 M. & W. 894; *In the Goods of Peck*, (1860) 2 Sw. & Tr. 506; *In the Goods of How*, (1858) 1 Sw. & Tr. 53; *Lambe v. Orton*, (1859) 29 L.J.Ch. 286; *In re Phené's Trusts*, (1869) 5 Ch. App. 139; *In re Aldersey—Gibson v. Hall*, (1905) 2 Ch. 181; *Doe d. Lloyd v. Deakin*, (1821) 4 B. & Ald. 433; *In re Benjamin*, (1902) 1 Ch. 723; *Webster v. Birchmore*, (1807) 13 Ves. 362; *Sillick v. Booth*, (1842) 6 Jur. 142, 144; *In re Lewis's Trusts*, (1871) L.R. 6 Ch. App. 356; *Thomas v. Thomas*, (1864) 2 Dr. & Sm. 298 (overruled, on another point, by *In re Phené's Trusts*, *supra*); *Rex v. Harborne*, (1835) 2 Ad. & El. 540. According to the head-note in *Drew v. Snowden*, (1862) 2 Dr. & Sm. 201, an absentee must be taken to have died on the last day of the seven years. There is nothing, however, in the reported judgment to justify such a note.

time *before* the expiration of the seven years.¹ Where, however, probable evidence is adduced to show that a party died at a particular time within the seven years, the Court may presume that the party died at that time.² On the other hand, if no sufficient evidence as to the time of death is forthcoming, the law will, *semble*, treat the fact as one incapable, under the circumstances of being determined.³

Scotland.—By the Common Law of Scotland, if a person disappears and cannot be traced, there is a presumption that he has lived on for a reasonable period, and, during that period, the onus of proving his death lies on the parties who aver the fact.⁴ This presumption has, however, been modified by statute,⁵ which practically applies to Scotland the English rule of law as to presumption of death in the case of persons domiciled in Scotland when last heard of.⁶ That is to say, where persons have disappeared and not been heard of for seven years and upwards, the Court may, on the petition of persons having limited or other interests in the estate of the supposed deceased person, find on the facts proved or admitted that such person died at some specified date within seven years after the date on which he was last known to be alive.⁷ Notwithstanding this finding, however, the claim of the absentee to his estate is not absolutely barred, in all respects, till after thirteen years from the date at which possession of the estate, or of the respective items thereof, have been obtained under the provisions of the Act.⁸

According to Scotch law, the absence of either spouse for four years, when it amounts to desertion (*i.e.* to malicious and obstinate non-adherence), is a ground of divorce.⁹

¹ *Per* Lord Denman C.J. in *Nepean v. Doe d. Knight*, (1837) 2 M. & W. at p. 913; *Webster v. Birchmore*, *supra*.

² *Webster v. Birchmore*, *supra*; *Rex v. Harborne*, *supra*; *Sillick v. Booth*, (1841) 1 You. & Coll. at p. 117.

³ See *In re Aldersey—Gibson v. Hall*, *supra*; *Wing v. Angrave*, (1860) 8 H.L.C. 183; *Underwood v. Wing*, (1854) 4 De G.M. & G. 633. These were, it is true, cases in which the question involved was whether there was any evidence of survivorship of one of several persons who perished in a common calamity. They are, however, it is submitted, *in pari materia*.

⁴ Erskine's *Principles of the Laws of Scotland*, 20th ed. p. 466; Maclaren's *Wills and Successions*, 3rd ed. vol. i. p. 65; and see *per* Lord Justice Clark Hope in *Fife v. Fife*, (1855) 17 D. 954.

⁵ The Presumption of Life Limitation (Scotland) Act, 1891 (54 & 55 Vict. c. 29), repealing the Presumption of Life Limitation (Scotland) Act, 1881, (44 & 45 Vict. c. 47). This Act does not apply to any claim against insurers under a policy of life assurance effected upon the life of any person who has disappeared (s. 11). It empowers the Court to dispense with consent of an absentee to the sale of property held *pro indiviso* (s. 4).

⁶ The Presumption of Life Limitation (Scotland) Act, 1891 (54 & 55 Vict. c. 29), s. 3.

⁷ *Ibid.*

⁸ *Ibid.* s. 7.

⁹ Conjugal desertion was made a ground of divorce by an Act of 1573, c. 55, which has been amended by s. 11 of the Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86); and see *Murray* (1894), 21 R. 723.

India.—The Indian Evidence Act, 1872,¹ which is based on the principles of English law as to the burden of proof when the question at issue is whether a man is alive or dead,² provides that when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it,³ and that if it is proved that he has not been heard of for seven years by those who would naturally have heard of him had he been alive, the burden of proving that he is alive is shifted to the person who affirms it.⁴ These enactments establish a uniform rule upon their subject-matter, both for Hindus and Mahomedans, as well as all others.⁵ There is, however, no presumption of law relative to the continuance of life in the abstract,⁶ and none as to the time of death, which must always be proved by actual evidence.⁷ The Court has power, however, to find the fact of death from the lapse of a shorter period of absence than seven years, if the circumstances concur to justify such a finding.⁸

Desertion for two years and upwards is not a ground of divorce in India, unless it be coupled with adultery,⁹ though it is of itself sufficient for a judicial separation.¹⁰ However, the Indian Penal Code,¹¹ which punishes the offence of bigamy, excepts from its operation any person who contracts a marriage during the lifetime of a former husband or wife, if such husband or wife at the time of the subsequent marriage shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, *provided* the person contracting such subsequent marriage shall, before such marriage takes place, inform the person, with whom such marriage is contracted, of the real facts of the case, so far as they are within his or her knowledge.¹²

Cape of Good Hope.¹³—There is no authority for the general proposition that, by the law prevailing in this Colony, a person who has not been heard of for seven years is absolutely presumed to be dead.¹⁴ But, by analogy to the English law, the Court holds that, in the Colony, seven years is sufficient to justify it in ordering the distribution of the property of an absent person, upon

¹ Act No. 1 of 1872.

² Rattigan's *Roman Law of Persons*, p. 93.

³ Act No. 1 of 1872, s. 107.

⁴ *Ibid.* s. 108, and see also s. 114.

⁵ Ameer Ali & Woodroffe's *Law of Evidence applicable to British India*, 4th ed. p. 573.

⁶ *Ibid.* p. 573.

⁷ *Ibid.*; and see *Dharup Nath v. Gobind Sarand*, (1884) 8 A. 614; *Rango Balaji v. Mudiyeppa*, (1898) 23 B. 296.

⁸ Ameer Ali & Woodroffe's *Law of Evidence applicable to British India*, 4th ed. p. 573.

⁹ The Indian Divorce Act (No. IV. of 1896), s. X.

¹⁰ *Ibid.* s. XXII.

¹¹ Act XLV. of 1860.

¹² *Ibid.* s. 494; and see Hamilton's *Indian Penal Code*, p. 542.

¹³ Such Colonies as possess Codes, namely, Mauritius, Lower Canada, St. Lucia, are dealt with *post*.

¹⁴ *Per De Villiers C.J.* in *In re Booysen*, (1880) 1 Ford at p. 189.

due security¹ being given, subject, however, to such considerations as regard the age and occupation of the absent person and the perils to which he may have been exposed.² The whole matter is, however, in such cases, *semblé*, left to the discretion of the judge.³

The malicious desertion of either spouse by the other is a good ground for divorce at the Cape,⁴ but in considering whether desertion has been established, length of absence, though an ingredient in the case, is not essential.⁵ Moreover, neither spouse is punishable, as for bigamy, if he or she reasonably and *bona fide* believed that his or her spouse was dead at the time of the subsequent marriage.⁶ Whether such belief is reasonable and entertained in good faith, is a question for the jury, but, as a general rule, it may be broadly stated that such a belief is neither unreasonable nor *mala fide* if the spouse has been absent for seven years or more, and, notwithstanding due inquiries, has not been heard of or from during that period.⁷

United States of America.—The length of absence that will give rise to the presumption of death varies in the different States.⁸ In most of them, however, a person is presumed to be dead after an absence of seven successive years, without any intelligence from him by those who would be likely to hear from him.⁹ The presumption of continued life, which the American law appears to sanction, then ceases. This period of seven years may, however, be shortened by proof of such facts and circumstances connected with the person whose life is the subject of inquiry as, submitted to the test of reason and experience, would force a conviction of death within a shorter period.¹⁰ Moreover, it is not necessary to prove a party's absence from the United States in order to raise the presumption

¹ This security is required for the restitution of any property received under the liquidation in the event of the person presumed to be dead afterwards turning out to be alive (*Institutes of Cape Law*, vol. i. pp. 206-7).

² *Per De Villiers C.J.* in *In re Booysen*, *supra*; *Re Kannemeyer*, (1890) 7 S.C. 322; *In re Kirby*, (1899) 16 S.C. 245.

³ *In re Booysen*, *supra*; and see *Ex parte Smit*, (1903) T.S. 12. The commentators upon the Dutch law show that great diversity existed as to the period of absence which would justify the liquidation of the estate of an absent person (*In re Booysen*, *supra*; *per De Villiers C.J.* at p. 189 of 1 Ford). According to the law of some places, seven years were sufficient, while according to others, sixteen and even thirty years were required (*ibid.*; and see Voet, *passim*).

⁴ Voet, 24, 2, 9; cf. *Institutes of Cape Law* by Maasdorfs, vol. i. p. 86.

⁵ *Per Curiam* in *Mostert v. Mostert*, (1855) 1 Searle at p. 131.

⁶ *Per De Villiers C.J.* in *In re Booysen*, *supra*.

⁷ *Ibid.*

⁸ Stimson's *American Statute Law*, p. 340.

⁹ *Ibid.*; Simonton's *Handbook of Practical Law*, p. 122; *Scott v. McNeill*, (1893) 154 U.S. 34. The New York City Civil Code provides that a person not heard from in seven years is dead (§ 1780, Art. 26). In some States death is presumed after an absence of three years, in others after two years or even one year, while fifteen years' absence is required in some States (Stimson's *American Statute Law*, p. 685).

¹⁰ *American Digest*, Century Edition, vol. xv. p. 2479; *North-Western Life Insurance Co. v. Stevens*, (1895) 71 Fed. 258.

under consideration if for seven years he has been absent from the particular State of his residence without having been heard of.¹

In many States, absence by a spouse without reasonable cause for a period of years amounts to such wilful desertion as will be a ground of divorce,² and, in some few States if either spouse is for five years absent and unheard of, or reported and believed to be dead, and the other marries again during the lifetime of the absent spouse, the marriage is void only from the time a decree of Court is pronounced to that effect.³ In the State of New York a marriage contracted after five years' absence of one spouse by the other, without knowledge that the absent spouse was alive within that time, is not bigamous.⁴

Contemporary Civil Codes.—The provisions contained in these Codes, with regard to the presumption of absence or death⁵ in the case of untraceable persons, seem to be more or less independent of the Roman civil law, which, indeed, originally at all events, refused to presume either the life or death of a person,⁶ though if it were once proved that a person had lived, he was held to be living until evidence of his death was produced.⁷ Nor was there ever any presumption as to the time of death, which had always to be proved as a fact.⁸ By the Roman civil law, a magistrate could always appoint

¹ *Newman v. Jenkins*, (1830) 10 Pick. 515.

² *American Digest*, Century Edition, vol. xvii. pp. 2132-3, and cases there cited.

³ *Stimson's American Statute Law*, p. 667.

⁴ *American Digest*, Century Edition, vol. vi. pp. 214-15.

⁵ The object of a declaration of death or disappearance is to settle the rights of inheritance and the family relations between the person who has disappeared and his connections; the rights of inheritance in a double sense: (1) in so far as claims may be made upon the estate of the person who has disappeared; (2) in so far as he may himself have claims against another estate (Bar's *Private International Law*, 2nd ed. p. 291). Such a declaration or judgment must have extra-territorial effect as proof of a fact at all events (*ibid.* p. 294).

⁶ Mackeldy's *Modern Civil Law*, s. 140; Rattigan's *Roman Law of Persons*, p. 93. In the case of absent persons it was originally only by custom that a presumption of death was introduced, where the absence continued during a certain period of time without any news being received of either the life or death of the absentee (Goudsmit's *Roman Law*, R. de Tracy Gould's edition, p. 46). As to whether the space of one hundred years, which in Roman law is sometimes designated the highest age of man (Mackeldy's *Modern Civil Law*, s. 140, note (c) p. 144), was ever regarded and treated as the limit of human life, so as to give rise to a general and legal presumption of death on its expiration, is somewhat doubtful (*ibid.*; Goudsmit's *Roman Law*, R. de Tracy Gould's edition, pp. 44, 47; see, however, Schuster's *Principles of Roman Civil Law*, p. 29; Taylor on *Evidence*, 10th ed. vol. i. p. 192), but, at all events, it seems to be certain that the absence of a person, for a much shorter period than one hundred years, afforded such presumption of his death as to enable his heir to take possession of the estate and to make a division of it, on giving adequate security to restore it if the party should be still alive (Burge's *Colonial and Foreign Laws*, vol. iv. p. 6).

⁷ Mackeldy's *Modern Civil Law*, s. 140; Rattigan's *Roman Law of Persons*, p. 93. The consent of the head of a family to the marriage of any one under his power was dispensed with after three years had elapsed since his absence from his home and since he was last heard of (Dig. 23, 2, 10).

⁸ Goudsmit's *Roman Law* (R. de Tracy Gould's edition), p. 47.

a curator to all persons under disability to manage their own business,¹ and, in like manner, an inability in this respect was eventually inferentially supposed to attach to an absentee whose whereabouts were not known, and an officer, termed *curator absentis*, was appointed, precedence for that office being accorded to the intestate's heirs, should such be capable, but if not, their tutors were to be preferred.²

In the case of the remarriage of supposed widows, some evidence of the death of the former husband was, *semble*, always required and regarded as necessary.³

Before referring to any specific Codes Civil, it may be as well to mention that most of those now in operation contain express provisions relative to absentees who cannot be traced, and prescribe what steps shall be taken in cases where a person possessed of property has disappeared for a specified period of time. These provisions seem to be, generally speaking, framed quite as much in the interest of the absentee as of his heirs and representatives, who, usually, in the first instance, merely obtain provisional possession—ultimately, however, maturing into definitive possession—entitling them, on giving security for due administration,⁴ to administer the effects of the absentee, to whom, nevertheless, they remain, for a time at least, strictly accountable, in case of his reappearance, of the discovery of his whereabouts, or of tidings being received of or from him.⁵ According to most of the existing Codes Civil, the length of a person's absence determines whether provisional or definitive measures shall be granted in respect of the absentee's property. The period of absence, however, varies somewhat in different countries, as also do the precise steps legally prescribed in the interest of the absentee and his heirs in such circumstances.⁶ Moreover, the age of the absentee, as well as the length of the absence, are in most of the Codes taken into consideration in deciding whether his death or absence shall be presumed.⁷

France and Belgium.—These Codes⁸ recognise three periods or degrees of absence,⁹ namely (a) where any period of time, but *less* than four years, has elapsed since the disappearance of the absentee; (b) where the absence

¹ Colquhoun's *Summary of the Roman Civil Law*, vol. i. par. 774, pp. 604-5.

² *Justin Novell*, 117 Ch. 11; and see Rattigan's *Roman Law of Persons*, p. 93.

³ Colquhoun's *Summary of the Roman Civil Law*, vol. i. par. 774, pp. 604-5.

⁴ See by way of example Codes Civil Fr. and Bel. Arts. 121, 123, *post*.

⁵ See Codes Civil Fr. and Bel. Arts. 125, 132.

⁶ See *post*, *passim*.

⁷ See *post*. Codes Civil Fr. and Bel. Art. 129; Germany, Art. 14; Austria, Art. 24; Port., Art. 80; Italy, Arts. 22, 26, 36; Spain, Art. 191; Lower Canada, Art. 98.

⁸ The French and Belgian Codes Civil contain practically identical provisions on the subject of absence. Verbal variations of no real importance, however, occur in Arts. 116, 118, 123, and 126 of the Belgian Code.

⁹ Codes Civil Fr. and Bel., Art. 112: "En droit, un individu est-il dit absent lorsqu'il a disparu de son domicile ou de sa résidence habituelle, et que son existence est devenue incertaine par suite de défaut de nouvelles depuis longtemps" (see Code Civil annoté par E. Fuzier-Herman, vol. i. p. 178). This form of absence must not be confounded with the *non-presence* referred to in Art. 840 of the Codes.

has extended to fully four years,¹ or, in the case of an absentee who has left behind him a power of attorney, after the lapse of ten years from the disappearance or last tidings respecting the absentee;² and (c), where the absence has continued for thirty years from the time when provisional possession of the absentee's property was granted by the Court, and one hundred years have elapsed from the birth of the absentee.³ In the first period, absence is only *presumed* not *declared*,⁴ and the sole measures sanctioned by the Court are for the protection of the absentee's property, by the appointment of an attorney, where the absentee has left no power of attorney behind him.⁵ In the second period, the absence is not merely *presumed*, but *declared*,⁶ and yet whatever may be the doubt of the absentee being alive, there is not even then considered to be sufficient ground for believing him to be dead.⁷ Consequently the only measures legally sanctioned are for the protection of the absentee's interests, should he return, and that of his heirs if he be dead.⁸ These measures consist mainly of a declaration of absence pronounced by the Court, at the instance of the absentee's heirs,⁹ after one year has elapsed from the order of the Court directing an inquiry,¹⁰ and followed by the giving of provisional possession of the absentee's property to his heirs.¹¹ In the third period, the absence having previously been declared, the Court may authorise definitive possession of the property of the absentee to be taken by the heirs, with a view to a division thereof amongst those entitled thereto.¹² Should the absentee, however, afterwards reappear, he is still entitled to recover his property in the condition in which it then is, and the price of what has been sold, or the property arising from the investment of such price.¹³

Should the absentee's spouse re-marry, such marriage can only be attacked by the absentee himself or by some person acting for him and armed with proof of his existence.¹⁴

Lower Canada.—The Code Civil of this Colony follows pretty closely the provisions of the French and Belgian Codes, in regard to the presumptions to which long absence gives rise,¹⁵ and recognises, as they do,

¹ Codes Civil Fr. and Bel. Art. 115.

² *Ibid.* Art. 121.

³ *Ibid.* Art. 129.

⁴ It is to be noted that the French and Belgian Codes never presume the *death* of the absentee, even after the period of absence referred to in Art. 129, but merely sanction a declaration of absence, which, however, seems to pre-suppose death.

⁵ Codes Civil Fr. and Bel. Art. 112.

⁶ *Ibid.* Arts. 115 *et seq.*

⁷ Burge's *Colonial and Foreign Law*, vol. iv. p. 10.

⁸ *Ibid.*

⁹ Codes Civil, Fr. and Bel. Art. 115. The Court will not pronounce a declaration of absence without paying due regard to the motives of the absence and to the causes which may have prevented news being received of the absentee (*ibid.* Art. 117).

¹⁰ *Ibid.* Art. 119.

¹¹ *Ibid.* Art. 120.

¹² *Ibid.* Arts. 129, 130.

¹³ *Ibid.* Art. 132.

¹⁴ *Ibid.* Art. 139. The Codes do not expressly provide for the case of an absentee, on his return, not attacking such a marriage.

¹⁵ See *ante*, p. 263, for provisions of these Codes in regard to absence. By the Code of Lower Canada, an absentee is one who, having had a domicile in Lower Canada, has disappeared without any one having received intelligence of his existence (Art. 86).

three periods of absence. Thus, in the first period, and quite irrespective of the length of the absence (if less than four years), should it be necessary to provide for the administration of the property of an absentee who has no attorney, or whose attorney is unknown or refuses to act, the Code permits a curator to be appointed.¹ The second period of absence, however, which justifies the giving of provisional possession of the absentee's property to his heirs is five years, and therefore one year longer than is required by the French and Belgian Codes,² though where there are strong reasons for supposing that the absentee is dead, provisional possession may be obtained before the expiration of such period of five years.³ After thirty years' absence, or if one hundred years have elapsed since the absentee's birth, he is reputed to be dead⁴ from the time of his disappearance, or from the latest intelligence received,⁵ and should he reappear afterwards, he recovers his property in the condition in which it then is,⁶ as is also provided by the French and Belgian Codes, in Art. 132 thereof.⁷

Mauritius.—In this Colony the French Code Civil, as modified from time to time by various ordinances, is maintained in force by the eighth Article of the Treaty of Capitulation of December 3, 1810.⁸ Consequently the provisions of that Code in regard to absentees, already set forth,⁹ seem to apply to Mauritius, so far as they do not conflict with the Curatelle Ordinance (No. 9 of 1890) on this subject. It is unnecessary to state, in detail, the provisions of this Ordinance, which are of considerable length. Briefly, they provide as follows: Any person absent from and not legally represented in the Colony who is entitled to property therein is, for the purposes of the Ordinance, an absentee.¹⁰ Whenever an official, termed the Curator of Vacant Estates, has reason to believe that there exists in the Colony any property or right belonging to or accruing to an absentee, such Curator shall apply to a judge for an order vesting such property or right in him,¹¹ which order is granted *ex parte*,¹² and has to be notified by advertisement in two daily papers.¹³ The vesting order, which, should the Curator fail to apply for it, may be obtained at the instance of a third party,¹⁴ affects all rights and property of the absentee in the Colony.¹⁵ A divesting order may afterwards be made on the application of any person entitled to represent the absentee for whom the Curator is acting,¹⁶ or on the application of the Curator himself.¹⁷

With regard to the re-marriage of the spouse of an absentee, if the

¹ Code Civil of Lower Canada, Art. 87. ² *Ibid.* Art. 93. ³ *Ibid.* Art. 94.

⁴ As already stated, the French and Belgian Codes do not enable the absentee's death to be presumed (see *ante*, p. 264).

⁵ Code Civil of Lower Canada, Art. 98. ⁶ *Ibid.* Art. 101. ⁷ *Ante*, p. 264.

⁸ Burge's *Colonial and Foreign Law*, new ed. vol. i. pp. 199 *et seq.* ⁹ *Ante*, pp. 263-4.

¹⁰ Curatelle Ordinance (No. 9 of 1890), Art. 13.

¹¹ *Ibid.* Art. 15 (1).

¹² *Ibid.* Art. 15 (2).

¹³ *Ibid.* Art. 15 (3).

¹⁴ *Ibid.* Art. 16.

¹⁵ *Ibid.* Art. 17.

¹⁶ *Ibid.* Art. 40.

¹⁷ *Ibid.* Art. 41.

husband has left the wife, or the wife her husband, and has been absent during ten consecutive years without news or information as to whether the absentee be alive or dead, it is lawful for the Court, upon proof of the facts, and of the fact that full and sufficient inquiry has been made, to decree and order the marriage to be dissolved.¹

St. Lucia.—The Code Civil of this Colony contains provisions with regard to absentees which are, in some respects, similar to those comprised by the French Code Civil.² An absentee is therein described as one who, having had a domicile in the Colony, has disappeared and whose existence is unknown.³ Should such a one have left no attorney to represent him, his property, etc., is administered by a Colonial Curator or Trustee,⁴ but at the instance of those interested, or if there be no minors amongst them, at the instance of a creditor, instead of a Colonial Curator, a Curator may be appointed⁵ whose powers, however, extend to the act of administration only.⁶ After five years' absence, and before such delay, if there be strong presumptions that the absentee is dead,⁷ the absentee's presumptive heirs may take possession of his property by authority of the Court,⁸ which, however, must take into account the reasons of the absence and the causes which have prevented the receipt of intelligence of or from the absentee.⁹ Provisional possession is a trust and makes those who obtain it liable to account to the absentee or to his heirs and legal representatives.¹⁰ After thirty years' absence, or one hundred years from his birth, provisional possession becomes absolute.¹¹ If the absentee reappear, or if his existence be proved during the time of the provisional possession, the judgment granting it ceases to have any effect.¹² After thirty years' absence or one hundred years from the birth of the absentee, should the absentee reappear, he recovers his property in the condition in which it then is,¹³ and within thirty years from the time at which possession becomes absolute, children and direct descendants of the absentee may claim restoration of his property in the state in which it then is.¹⁴

The presumption of death arising from absence, whatever be its duration, does not apply in the case of marriage, and neither the husband nor wife of the absent spouse can marry without producing proof of the death of the absent spouse.¹⁵

Germany.—The subject of absence and presumption of death is governed by the German Civil Code of August 18, 1896, which, on this subject, adopts a combination of the systems of Roman law and English law.¹⁶

¹ Ordinance No. 12 of 1872.

³ Code Civil, St. Lucia, Art. 52.

⁶ *Ibid.* Art. 57.

⁹ *Ibid.* Art. 61.

¹² *Ibid.* Art. 66.

¹⁵ *Ibid.* Art. 74.

² See *ante*, French Code Civil.

⁴ *Ibid.* Art. 53.

⁵ *Ibid.* Art. 54.

⁷ *Ibid.* Art. 60.

⁸ *Ibid.* Art. 59.

¹⁰ *Ibid.* Art. 62.

¹¹ *Ibid.* Art. 64.

¹³ *Ibid.* Art. 67.

¹⁴ *Ibid.* Art. 68.

¹⁶ Schuster's *Principles of German Civil Law*, p. 30.

It permits an adjudication of death to be made if for ten years no news has been received that the absentee is alive.¹ Such adjudication cannot, however, be made before the close of the year in which the absentee would have completed his thirty-first year.² In the case, however, of a missing person who would have completed his seventieth year, he may be declared dead if for five years no news has been received that he is alive.³ Moreover, one who has been in peril of life, under circumstances mentioned in Arts. 15 and 16 of the Code,⁴ may be declared dead after much shorter periods of absence than those already stated, while one who has been in peril of his life under circumstances other than those mentioned in the said last-mentioned articles, and who has not since been heard from, may be declared dead upon the expiration of three years after the event which caused the peril of life aforesaid.⁵ The declaration of death establishes the presumption that the person who cannot be traced and has disappeared died at the time set forth in the adjudication which contains the declaration of death, and if the day of death only has been fixed, the end of that day is taken to be the time of death,⁶ and until the adjudication of death has been made, the life of the person who has disappeared is presumed to continue up to that point of time.⁷

If a spouse, after the other spouse has been declared dead, contracts a new marriage, the new marriage is not void because the spouse declared to be dead is still living, unless both spouses at the time of the marriage know that such spouse has survived the declaration of death.⁸ Upon the consummation of the new marriage, the former marriage is dissolved, and remains dissolved even if the declaration of death is revoked in consequence of an action contesting the marriage.⁹

Austria.—By the General Civil Code of 1811, which applies to all the German Hereditary Provinces of the Austrian Monarchy, it is provided¹⁰ that if there should be a doubt as to whether an absent person or a missing

¹ The German Civil Code, 1896, Art. 14.

² *Ibid.* This provision does not, *semble*, apply to the cases provided for by Arts. 15 to 17 of the Code, *infra* (The German Civil Code, annotated by Chung Hui Wang, note (p) p. 3).

³ Art. 14.

⁴ The excepted cases referred to in which death will be presumed and declared after shorter periods are (1) where members of an armed force (whether of the Empire or of a foreign Power makes no difference) who have served in war have been missed during the war. These may be declared dead after the conclusion of peace (Art. 15); (2) where any person was on board a ship lost, or presumed to be lost, at sea (Art. 16).

⁵ Art. 17.

⁶ The German Civil Code, 1896, Art. 18. By German law, a person is presumed to have lived up to the moment in which he is presumed to have died (Schuster's *Principles of German Civil Law*, p. 31).

⁷ *Ibid.* Art. 19. In an ordinary case the time of death is presumed to be the earliest moment at which the declaration of death would have been admissible (Schuster's *Principles of German Civil Law*, p. 30).

⁸ Art. 1348.

⁹ *Ibid.*; and see Arts. 1349-52.

¹⁰ Art. 24. Code translated by Joseph M. Chevalier de Winiwarter (Vienna, 1866).

person is still living or not, his death is only to be supposed under the following circumstances :

- (1) When a period of eighty years has elapsed since his birth, and his place of residence has remained unknown for ten years.
- (2) Without regard to the time which has elapsed since his birth, if his place of residence has remained unknown for fully thirty years.
- (3) When he has been severely wounded in war, or when he was on board a ship at the time it was shipwrecked, or otherwise in imminent danger of his life, and when he has been missing for three years from that time.¹

In all these cases the declaration of death can be applied for and granted under the precautions prescribed by the Code.² The day on which a declaration of death has obtained its validity at law is considered as the legal day of the death of a person who is absent.³ Such declaration, however, does not exclude the proof that the absent person has died, sooner or later, or that he is still living, and, if such proof be established, the person who on the ground of the judicial declaration of death has taken possession of a property is to be treated like another *bona fide* possessor.⁴

The mere lapse of the time fixed by the Code for declaration of death of an absent spouse does not authorise the other party to consider the marriage as dissolved, and to proceed to another marriage.⁵ If, however, this absence is accompanied by such circumstances as leave no reason to doubt that the absent person is dead, the judicial declaration that the absent person may be considered dead and the marriage dissolved may be applied for to the privileged Court of the district in which the deserted spouse resides.⁶

Russia.—In the Baltic Provinces of Russia, a judgment of death in respect of an absent person who has not given tidings of his existence during a period of delay prescribed by the Baltic Code can be obtained.⁷ Such a judgment produces the same results as a death certified upon direct evidence of the fact.⁸

Sweden.—The provisions of the Swedish Code Civil in regard to the presumption of death where a vacant possession occurs through long

¹ Art. 24.

² The tribunal to whom application is made for the judicial declaration of the death of a person who is absent has first of all to appoint a curator for the absentee, who is then summoned by an edict, the term of which is fixed for a year, with the addition that the tribunal, if he does not appear within this time, or if he does not inform the tribunal in another way of his existence, will proceed to the declaration of his death (Art. 777 of Austrian General Civil Code).

³ Art. 278.

⁴ *Ibid.*

⁵ Art. 112.

⁶ *Ibid.*; and see Arts. 113 and 114 as to procedure required to be adopted by the deserted spouse, before remarriage, indicating the precautions prescribed in such cases.

⁷ Baltic Code Civil, Arts. 2582, 2583, cited at p. 440 of Lehr's *Eléments de Droit Civil Russe*.

⁸ *Ibid.*

absence are very explicit, and not so complicated as those contained in some other Codes.¹ They provide that, in the case of a person who has disappeared without his abode being known, but who was known to have been alive during the last twenty years, a declaration of presumption of his decease may be obtained² after proper advertisements have been issued in the press.³ Where, however, it is certain that the absentee was left gravely wounded in war, or was on board a shipwrecked vessel, and it is not known whether he was saved, death is presumed after five years since news of the absentee was last received,⁴ and also where it is proved that the absentee, if alive, would be ninety years of age.⁵

Absence by itself of a husband is not in Sweden a cause of divorce unless it assumes the character of abandonment, that is to say, is without sufficient excuse, or amounts to malicious desertion.⁶ Moreover, where the husband's residence is unknown, his wife after six years, if she has been well conducted, may be allowed to re-marry,⁷ but should her husband afterwards reappear and give sufficient excuses for his absence, he may take back his wife.⁸

Holland.—The Dutch Code Civil defines what provisional measures shall, in the first instance, be taken in the case of the absence of a person whose whereabouts cannot be traced, to safeguard his property;⁹ but postpones the declaration of presumption of death till after five years have elapsed since tidings of the absentee were last received.¹⁰ After thirty years' absence from the day when death has been legally presumed, or if one hundred years have elapsed since the birth of the absentee, the distribution of his goods becomes definitive.¹¹

After ten years since a malicious desertion (as distinguished from mere unexplained absence) by either spouse of the other took place, and after certain precautions in the interest of the deserting spouse have been observed, giving him or her an opportunity of disclosing his or her whereabouts and re-appearing, the deserted spouse may be authorised to re-marry,¹² in which case the other spouse may also contract a fresh marriage.¹³

Spain.—The Spanish Code Civil provisionally protects, in the first instance, an absentee's property quite irrespective of the length of his absence, as soon as his disappearance from home, leaving no address, has been ascertained.¹⁴ It

¹ See *Les Codes Suédois*, par Raoul de la Grassière (published 1895), *passim*; Ordinance Royale of May 20, 1885, which supplies a gap in the Code.

² Swedish Code, Titre des Successions, chap. xv.; Ordinance Royale of May 20, 1885, Art. 1.

³ Ordinance Royale, May 20, 1885, Art. 3.

⁴ *Ibid.* Art. 2.

⁵ *Ibid.*

⁶ Swedish Code Civil, Titre du Mariage, chap. xiii. Arts. 4, 6.

⁷ *Ibid.* Art. 6.

⁸ *Ibid.*

⁹ Arts. 519 *et seq.*

¹⁰ Art. 523. The Law of July 9, 1855, shortens the period mentioned in this Article for obtaining a declaration of presumption of death in certain cases, where persons have been exposed to and experienced special perils, such as shipwrecks, etc.

¹¹ Dutch Code Civil, Art. 540.

¹² *Ibid.* Art. 549.

¹³ *Ibid.* Art. 551.

¹⁴ Spanish Code Civil, Arts. 181-3.

permits a declaration of absence to be obtained, by certain prescribed persons,¹ after the expiration of two years without any tidings of the absentee, or after five years where he has left some one to administer his goods during his absence.² After thirty years' absence, however, or if ninety years have elapsed since the birth of the absentee, the judge, on the demand of persons interested, may declare the presumption of death,³ which decree, however, is not executed till six months from the date of its publication in official journals, when the succession to the property of the absentee is opened.⁴ But even after a declaration of presumption of death has been pronounced, the absentee, should he afterwards appear, is entitled to re-take his property, but only in its then state and condition.⁵

Portugal.—According to the Portuguese Code Civil a provisional administrator may be appointed, if necessary, whenever a person has disappeared from his place of domicile or residence,⁶ and after four years' absence without any tidings of him, or after ten years where he has left a properly appointed attorney to act for him, definitive possession may be obtained,⁷ provided certain prescribed precautions are taken.⁸ After twenty years' absence, or after ninety-five years have elapsed since the absentee's birth, his goods, etc., can only be recovered by those entitled thereto in the state in which they then may be.⁹

Italy.—The Italian Code Civil, on the subject of absence and the presumptions it gives rise to, contains provisions similar in many respects to those of the French and Belgian Codes on the same subject.¹⁰ It defines an absentee as one who has ceased to appear in the place of his last domicile or last residence, and of whom there is no news, and presumes his absence.¹¹ So long as the absence is merely presumed, some person is appointed to take all measures necessary to preserve the absentee's patrimony.¹² After three continuous years of presumed absence, or after six years if the absentee has left an attorney behind him to represent him, a declaration of absence may be pronounced,¹³ and his property sent into temporary possession¹⁴—during the duration of which, should the absentee return, or there be proof forthcoming of his existence, he becomes entitled to the restoration of his property, together with the revenues produced by it.¹⁵ After thirty years, since temporary possession was obtained, or if one hundred years have elapsed since the birth of the absentee and it is three years at least since there was any news of him, a decree authorising definitive possession to be taken may be pronounced.¹⁶ Such a decree may also be obtained when the one hundred years since the absentee's

¹ Spanish Code Civil, Art. 185.

² *Ibid.* Art. 184.

³ *Ibid.* Art. 191.

⁴ *Ibid.* Art. 192.

⁵ *Ibid.* Art. 194.

⁶ Portuguese Code Civil, Art. 55. It also provides, by special articles (82 to 96, inclusive), for administration of property of a married absentee.

⁷ *Ibid.* Art. 64.

⁸ *Ibid.* Arts. 65 *et seq.*

⁹ *Ibid.* Art. 80.

¹⁰ See *ante*, pp. 263 4.

¹¹ Italian Code Civil, Art. 20.

¹² *Ibid.* Art. 21.

¹³ *Ibid.*; see Arts. 22-5.

¹⁴ *Ibid.*; see Arts. 26 *et seq.*

¹⁵ *Ibid.* Art. 33; see also Art. 31.

¹⁶ *Ibid.* Art. 36.

birth expired before the declaration of absence was pronounced, or after such declaration, but before the decree granting temporary possession of the absentee's property was granted, though not until successful application has been made for a declaration of absence.¹ After definitive possession has been obtained, the absentee can only recover his property in the state in which he finds it at the time of his re-appearance.²

A marriage contracted during the absence of one spouse by the other cannot be attacked so long as the absence continues.³

II. THE PRESUMPTION OF SURVIVORSHIP AMONGST PERSONS WHO HAVE PERISHED IN A COMMON DISASTER.⁴

This presumption is of great practical importance, and is frequently invoked where the persons who have perished through a common calamity are either entitled to succeed each other or where one of them derives some right in the property of the other in the event of survivorship.⁵ The cases to which the presumption applies are often of considerable difficulty, especially when, from their circumstances, the order of time in which the deaths of the commorientes occurred cannot be directly proved.⁶

In England.⁷—The English law, which formerly did not appear to have adopted any decided rule on this subject,⁸ now regards it from first to last as one of fact, depending wholly on evidence, and should the survivorship of any one person not be proved, treats the question as a matter incapable of solution,⁹ and always casts the *onus probandi* on the person asserting, affirmatively, the survivorship of any one of the commorientes.¹⁰ Thus, though it has been

¹ Italian Code Civil, Art. 38.

² *Ibid.* Art. 39.

³ *Ibid.* Art. 113. A marriage contracted in good faith, though afterwards declared null and void, produces like civil consequences, both in regard to the contracting parties and their children acknowledged before such marriage was annulled, as does any other marriage (*ibid.* Art. 116).

⁴ Such persons are, for the sake of brevity, termed *commorientes*, i.e. persons dying together. The subject of survivorships amongst them frequently arises in probate cases (Tristram & Coote's *Probate Practice*, 14th ed. pp. 195 *et seq.*; and see *In the Goods of Beynon*, 1901, p. 141; *In the Goods of Ewart*, 1859, 1 Sw. & Tr. 258), and also in equity cases (see *In re Tindall*, 1861, 30 Beav. 151; *Ommany v. Stilwell*, 1856, 23 Beav. 328; *Dowley v. Winfield*, 1844, 14 Sim. 277; *In re Walker*, 1871, L.R. 7 Ch. 120; *Wollaston v. Berkeley*, 1876, 2 Ch.D. 213; *Barnett v. Tugwell*, 1862, 31 Beav. 232; *In re Elliott—Elliott v. Smith*, 1882, 22 Ch.D. 236).

⁵ See McClaren's *Wills and Successions*, 3rd ed. vol. i. p. 63.

⁶ Burge's *Commentaries on Colonial and Foreign Laws*, vol. iv. p. 11; and see McClaren's *Wills and Successions*, 3rd ed., vol. i. p. 63.

⁷ Includes Ireland.

⁸ Best on *Presumptions of Law and Fact*, p. 193.

⁹ *In the Goods of Alston*, (1892) P. 142; *Underwood v. Wing*, (1854) 4 De G. M. & G. 633, 656; *Barnett v. Tugwell*, *supra*; *Scatterthwaite v. Powell*, (1834) 1 Curt. 706; *Robert v. Murray*, (1834) 1 Curt. 596; *In the Goods of Ewart*, *supra*; *In the Goods of Wainwright*, (1859) 1 Sw. & Tr. 257.

¹⁰ *Wing v. Angrave*, (1860) 8 H.L. 133; and see *Taylor v. Diplock*, (1815) 2 Phill. 261; *In re Green's Settlement*, (1865) L.R. 1 Eq. 288; *Mason v. Mason*, (1816) 1 Mer. 308.

laid down as being hardly within the range of imagination that two persons should cease to breathe at the same time,¹ there is no presumption of law on the subject.² Moreover, the age or sex of the deceased persons does not of itself suffice to solve the riddle of survivorship.³ Where, however, two persons die of the same stroke or accident, and there are no special circumstances in evidence from which it can be presumed that one died before the other, the law will draw that presumption from general circumstances, such as the comparative health, strength, age, or experience of the parties.⁴ It recognises, however, no artificial presumption in cases of this nature, but merely leaves the real or superior strength of one of the parties perishing by a common calamity to its natural weight, as a circumstance proper to be taken into consideration by the tribunal called upon to determine the question of survivorship, but which circumstance, standing alone, is insufficient to shift the burden of proof⁵ if, therefore, there is no further evidence before the Court than the assumption that from age or sex one party struggled longer against their common death than his companion, no presumption of survivorship will be raised.⁶

In Scotland.—The series of subtle presumptions of fact, of a more or less arbitrary kind, sanctioned by the civil law for the purpose of determining which of two or more commorientes died last have not, it seems,

¹ *Underwood v. Wing*, (1855) 24 L.J. Ch. 293. In the Ecclesiastical Courts the presumption adopted was, *semble*, that all the commorientes perished together and could not therefore transmit rights one to the other (Phillips & Arnold on *Evidence*, vol. i. pp. 478, 479; *Taylor v. Diplock*, 1815, 2 Phill. Eccl. 261). The German Code of 1896 also adopts this view (see *post*).

² *Wing v. Angrave*, *supra*; *Sillick v. Booth*, (1841) 6 Jur. 142, 144; Best on *Presumptions of Law and Fact*, p. 202; but see *per* Sir William Wynn in *Wright v. Sarmuda* (or *Wright v. Netherwood*), 1793, cited in a note to *Taylor v. Diplock*, (1815) 2 Phill., pp. 266, 267.

³ *Wing v. Angrave*, *supra*. It will be seen, *post*, that some of the contemporary Codes Civil determine the fact of survivorship upon certain arbitrary presumptions depending on the age and sex of the commorientes. There are many instances in which principles of law have been adopted from the civilians by our English Courts of Justice, but none, *semble*, in which they have adopted presumptions of fact from the rules of the civil law (*per* Grant M.R. in *Mason v. Mason*, 1816, 1 Mer. 308, at p. 312).

⁴ *Sillick v. Booth*, (1841) 1 You. & Coll. at pp. 121, 126; and see *Broughton v. Randall*, (1596) Cro. Eliz. 502; Best on *Presumptions of Law and Fact*, p. 193; Phillips & Arnold on *Evidence*, vol. i. pp. 478, 479.

⁵ Best on *Presumptions of Law and Fact*, p. 201.

⁶ *Ibid.* p. 202. Where a husband and wife, having made mutual wills, each appointing the other sole executor and universal legatee, subsequently went to sea in the same ship, which never arrived at its destination, and was presumed to have been lost with all hands, it was held that there was no presumption of law as to which of the two, the husband or the wife, died first (*In the Goods of Alston*, 1892, P. 142; and see *Barnett v. Tugwell*, 1862, 31 Beav. 232; *In the Goods of Johnson Brothers*, 1898, 78 L.T. 85; *Wollaston v. Berkeley*, 1876, 2 Ch.D. 213). The only safe form of will for a married pair having identical testamentary wishes, and who are anxious to provide for the contingency of their deaths unexpectedly occurring by the same cause, appears to be to devise to a trustee, in trust, first, to accumulate the income for six months, next to transfer the estate to the wife (or husband) *if living at the expiration of the six months*, and next, if not then appearing to be living, to the desired secondary devisees (see Wigmore on *Evidence*, vol. iv. p. 2533).

been adopted in Scotland,¹ where, as in England, if satisfactory evidence of survivance cannot be obtained, neither, or no one of them, is held to have outlived the other.²

India.—By the Indian Evidence Act, 1872,³ the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in relation to the facts of the particular case.⁴ This, however, does not entitle the Court to presume that any one of several commorientes survived the others on the ground of age, sex, or state of health, but, as in England, each case must be determined upon its own peculiar facts and circumstances, so that, in the absence of any evidence on the subject, the question of survivorship must be regarded as unascertainable, and in such cases is determined as if the death of all had occurred simultaneously.⁵

Cape of Good Hope.—The Roman-Dutch law⁶ on the subject of survivorship amongst commorientes appears to be in accord with the Roman civil law—that is to say, in cases of succession *ab intestato*, the legal presumption of survivorship is founded upon the considerations and circumstances of age, sex, and physical strength,⁷ while in cases of testate successions the claimant must as a rule, prove his title to that which he claims.⁸

United States of America.—In most of the States there appears to be no presumption from age, sex, or strength for determining questions of survivorship amongst those perishing by the same calamity, the doctrine of the civil law in regard thereto not finding a place, either as part of the common law or as an enactment of the legislative authority.⁹ Nor does

¹ McClaren's *Wills and Successions*, 3rd ed. vol. i. pp. 67, 68; Erskine's *Principles of the Law of Scotland*, 20th ed. p. 467. The rules of the civil law are only binding in Scotland, in relation to new questions, in so far as they are reasonable, and in the matter of survivorship amongst commorientes the Court would most probably disregard the special presumptions of fact and follow the English rule that proof of the fact of survivance is incumbent on the party making the allegation (McClaren's *Wills and Successions*, 3rd ed. vol. i. at p. 68).

² Bell's *Principles of the Law of Scotland*, 10th ed. par. 1640; Erskine's *Principles of the Law of Scotland*, 20th ed. p. 467.

³ Act No. I. of 1872.

⁴ S. 114.

⁵ *The Law of Evidence applicable to British India*, by Ameer Ali & Woodroffe, 4th ed. pp. 608, 609.

⁶ This law is practically the Roman law gradually adapted to the growing needs of a modern community (Manfred Nathan's *Common Law of South Africa*, vol. i. p. v). In matters for which it does not provide, the English law is invoked for decision, and hitherto the two systems have not clashed (*ibid.* p. vi).

⁷ Manfred Nathan's *Common Law of South Africa*, vol. iii. par. 1927, pp. 1943, 1944.

⁸ *Ibid.*

⁹ See *American Digest*, Century Edition, vol. xv. pp. 2491 *et seq.*; Greenleaf's *Law of Evidence*, 13th ed. vol. i. pars. 29, 30; *Smith v. Croom*, (1857) 7 Fla. 81. In California and Louisiana, where there are no circumstances of fact available, survivorship is made to depend on age or sex (Stimson's *American Statute Law*, p. 344) in much the same way as is prescribed by the French and Belgian Codes (see *post*, p. 275).

there seem to be any presumption that all died at the same moment, but the fact of survivorship, like every other fact, has to be proved by the party asserting it.¹ However, where the calamity, though common to all, consists of a series of successive events separated from each other in point of time and character, and each likely to produce death upon the several victims according to the degree of exposure to it, the difference of age, sex, and physical strength becomes a matter of evidence and may be considered.²

Contemporary Civil Codes.—The Roman civil law had certain laws as to the order in which several commorientes were presumed to have died,³ which, nevertheless, were subject to many exceptions. It, however, rather favoured the person in possession of property, or the person that did not require to invoke the aid of the law,⁴ and presumed that one of several commorientes survived another only in cases of succession between parents and children, when it adopted that presumption which was most favourable to those who would succeed according to the course of nature.⁵ Thus a child above the age of puberty was presumed to have survived the parent when both perished in the same disaster,⁶ while, in like circumstances, one under that age was presumed to die first,⁷ and also one who had only just attained puberty.⁸ So a son was presumed to have survived his father where both were killed in battle.⁹ Save in such cases, however, if there was no evidence which of two or more persons died first, there was no legal presumption that one died before the other.¹⁰

Though the French and Belgian Codes have largely adopted the doctrines of the Roman civil law in regard to survivance amongst commorientes, making the fact depend upon arbitrary assumptions as to age and sex, most of the Codes have, it will be seen, wisely rejected these subtleties and treat the question as being one of fact, to be decided by evidence alone.¹¹

¹ *American Digest*, Century Edition, vol. xv. pp. 2491 *et seq.* and cases there cited; but see *Walton & Co. v. Burchel*, (1907) Tenn. 121.

² *Smith v. Croom*, *supra*.

³ Schuster's *Principles of German Civil Law*, p. 31.

⁴ Hunter's *Roman Law*, 3rd ed. p. 928.

⁵ Burge's *Colonial and Foreign Law*, vol. iv. pp. 12 *et seq.*

⁶ D. 34, 5, 22. The reason for regarding the son as having survived his father was not due to any abstract idea of the probability of a son being the stronger of the two (Hunter's *Roman Law*, 3rd ed. p. 929), for, when the father was a freedman, and his patron was therefore entitled to succeed in default of issue, the presumption was reversed, and it was held that the father survived the son, in order that the rights of the patron might be secured (D. 34, 5, 23).

⁷ D. 35, 5, 23.

⁸ Burge's *Colonial and Foreign Law*, vol. iv. p. 13.

⁹ D. 34, 5, 9, 1. Where father and son were shipwrecked, the one who was shown to have been last seen was presumed to have lived the longer (D. 35, 5, 3).

¹⁰ D. 34, 5, 18 pr.

¹¹ See Lehr's *Éléments de Droit Civil Russe*, p. 449; Phillips & Arnold on *Evidence*, vol. i. pp. 478, 479.

France and Belgium.—The Codes Civil of these two countries¹ contain various highly technical provisions, largely borrowed from the Roman civil law, on the subject of survivorship amongst commorientes, whereby the presumption under consideration is determined by the circumstances of fact in each case, and, in default thereof, by the force of age or sex.² These provisions are, briefly, as follows, namely where several persons respectively called to the succession of each other perish by one and the same accident, so that it is impossible to ascertain which died first, the presumption of survivorship is determined by circumstances, and, in their absence, by the considerations of age and sex, conformably to the following rules :³

- (a) Where those who perished together were under fifteen, the eldest is supposed to have survived ;
- (b) If they were all above the age of sixty, the youngest is presumed to have survived ;
- (c) If some were under fifteen, and others over sixty, the presumption of survivorship is in favour of the former ;⁴
- (d) If those who perished together were all between the full ages of fifteen and sixty, and of different sexes, the male is always presumed to have survived, if the ages are equal or the difference of age does not exceed one year, while if they were of the same sex, the order of nature is followed, according to which the youngest is presumed to have survived.⁵

Lower Canada.—The articles of the Code Civil of Lower Canada are almost identical with those of France and Belgium on the subject of survivorship amongst commorientes.⁶ Where, however, some of the commorientes were under fifteen or over sixty years of age, *and the others in the intermediate state*, the Canadian Code provides that the presumption of survivorship is in favour of the latter.⁷

¹ The articles of the French and Belgian Codes Civil are substantially identical on the subject under consideration.

² These provisions only apply to intestacies, and not to wills, and where the victims have perished by the same calamity, and not, therefore, where several people living in the same house are successively assassinated by the same person (Code Civil annoté par E. Fuzier-Herman, vol. ii. p. 26). Moreover, while they apply to cases where two persons who have died in the same event were respectively called to the succession, the one from the other, they do not govern a case where only one of the commorientes was *successible de l'autre* (*ibid.* p. 25). Nor do they apply to gifts to spouses subject to the condition of surviving the donor, nor to unilateral gifts (*ibid.* p. 26). They do, however, apply to heirs and also to all other persons interested (*ibid.*).

³ Codes Civil Fr. & Bel. Art. 720.

⁴ *Ibid.* Art. 721.

⁵ *Ibid.* Art. 722, and see Arts. 1350 *et seq.*

⁶ Code Civil of Lower Canada, Arts. 603-5 (inclusive).

⁷ *Ibid.* Art. 604. The words in italics are not found in the French or Belgian Code Civil, Art. 721.

Mauritius.—The provisions of the French Code Civil on the subject of survivorship amongst commorientes seem to apply to this Colony, saving so far as they may have been altered or modified by Orders-in-Council.¹

Germany.—By the Code Civil of 1896 it is provided that if several persons have perished in a common disaster it is presumed that they died simultaneously.² The effect of this provision is that neither of two persons perishing together by the same calamity can become entitled to any right in the estate of the other as his survivor.³

Austria.—In cases of doubt as to which of two or several deceased persons died first, he who maintains the previous death of the one or the other must prove his assertion; if he cannot do that, they will all be considered as having died at the same time, and there can then be no question of transferring the rights of the one to the other.⁴

Russia.—It is doubtful whether there is any express legal provision dealing with the question of survivorship among commorientes,⁵ though, *semble*, the provisions on this subject contained in the French Code Civil were at one time in full force and vigour in Poland.⁶ In the Baltic Provinces of Russia, where two persons perish by the same calamity, they are supposed to have died simultaneously,⁷ except in the case of an ascendant and his descendant, when it is presumed that the latter, if a minor, died first, but if of age, that he survived the ascendant.⁸

Sweden.—There does not seem to be any express provision in the Code Civil of this country as to survivorship amongst commorientes,⁹ though it is thereby provided that where there is no evidence of survivorship, the inheritance of each person passes to its nearest relations.¹⁰

Holland.—The Dutch Code Civil is silent on the subject under consideration.

Spain.—The Spanish Code Civil does not concern itself with the subject of commorientes.

Portugal.—The Code Civil of this country provides that if the *de cujus*,¹¹ his heirs and his legatees have perished in the same disaster, or have died on

¹ See *ante*, p. 265. The Curatelle Ordinance (No. 9 of 1890), which, as already stated (*ante*, p. 265), applies to the presumption of death in case of absentees, does not seem to deal with *survie* of persons perishing in the same disaster.

² Art. 20.

³ Schuster's *Principles of the German Civil Law*, p. 31.

⁴ Austrian Code Civil, Art. 25.

⁵ Lehr's *Eléments de Droit Civil Russe*, p. 449.

⁶ *Ibid.*

⁷ Lehr's *Eléments de Droit Civil Russe*, p. 449; and see Code Baltique, Art. 2584. Even reduced to these limits this somewhat arbitrary presumption seems not to be exempt from criticism (Lehr's *Eléments*, etc., p. 449).

⁸ *Ibid.*; and see Code Baltique, Art. 2585.

⁹ See Code Suédois, p. 31.

¹⁰ Swedish Code, Title "Successions," chap. iv. Arts. 1-3.

¹¹ *I.e.* *De cujus successione agitur* (he whose succession is in question).

the same day, and it is impossible to decide or ascertain which died first, they must be considered as having died at the same time, and there is then no room between them for the transmission of succession or legacies.¹

Italy.—The Italian Code Civil does not seem to contain any articles dealing with survivorship amongst persons who perish in a common disaster.²

¹ Portuguese Code Civil, Art. 1738.

² See *Code Civil Italien*, par Henri Prudhomme, Introduction, p. xliii.

THE HAGUE CONFERENCE ON BILLS OF EXCHANGE.¹

[*Contributed by* SIR MACKENZIE CHALMERS, K.C.B., K.C.S.I.]

THE International Conference on the unification of the laws relating to bills of exchange, held at the Hague in June and July last, makes a new and hopeful departure in private international law. If there is one thing more than another that facilitates international commerce it is uniformity of commercial laws, and this principle applies perhaps in a greater degree to bills of exchange than to any other mercantile instrument or transaction. Though cable transfers are superseding bills in certain limited branches of trade, bills of exchange are still the main international currency, and their usefulness as currency largely depends on their uniform treatment by the laws of the different countries through which they are negotiated. No fitter subject could have been chosen for the new experiment.

The Conference was convened by the Netherlands Government, at the instance of Germany and Italy, and was attended by accredited delegates from thirty-five nations, some of them having full powers while others had more or less limited instructions (Blue-Book, pp. 1 and 26). Much good preliminary work has been done by private associations, such as the Association of Private International Law, but I think this is the first occasion on which the governments of all the great mercantile Powers have combined officially to secure the unification of an important branch of commercial law.

The Conference was an interesting one. It was not composed of "jurists," who, according to Lord Bramwell, are worthy persons knowing a little about the laws of all countries except their own. The delegates included merchants, bankers, practising lawyers, judges, ministers of state, and diplomatic representatives. To take, as an example, bankers, who perhaps know as well as any one where the bills of exchange shoe pinches. England was represented by Mr. F. Huth Jackson, a director of the Bank of England and president of the Institute of Bankers. The United States sent Mr. C. A. Conant, a New York banker and a well-known writer on banking matters. The German delegation included M. Fischel, a partner in the great Berlin bank of Mendelssohn & Co.; the French delegation included M. Picard, the general secretary

¹ See Foreign Office Blue-Book, "Correspondence relating to the Conference on Bills of Exchange," October 1910. [Cd. 5224.]

of the Bank of France ; and the Austrian delegation included M. Hammer-schlag, the manager of the Imperial Credit Society of Vienna.¹ The Conference lasted five weeks and sat continuously. The language used throughout was French, and full discussion was no doubt handicapped by the fact that only three out of the thirty-five nations represented (*viz.* France, Belgium, and Switzerland) were speaking their own tongue. But where so many tongues were collected together, any other rule would have been impossible.

The Questionnaire (Blue-Book, p. 4), which was circulated three months before the Conference met, raised eighty-nine points for discussion, and in the course of the Conference a good many more were raised. Some questions were debated at considerable length, while others, and not always the least important ones, were sometimes perfunctorily and inadequately discussed. For example the German rule that the holder of a bill, who claims through a forged indorsement, gets a good title, if he takes the bill in good faith, and the indorsements appear to be in order, was passed without discussion, except for the dissent of England and the United States. The English rule that the duties of the holder, as to presentment, protest, and notice of dishonour, are not absolute duties, but duties of reasonable diligence, found no defenders except ourselves.

The instructions to the English delegates were precise :

As a general rule the British delegates will not hold out any hope that English rules of law are likely to be substantially modified and brought into conformity with continental rules, particularly in cases where the English rule prevails, not only in the United Kingdom, but also throughout the English-speaking world. . . . There are, nevertheless, certain points on which the English law is doubtful, or where there are points of divergence between the different English-speaking communities. In such cases it would evidently be desirable if a uniform law could be arrived at, and the uniformity of the rule is probably of more importance than the nature of the rule itself (Blue-Book, p. 20).

Throughout the Conference the delegates from England and the United States took the same line, and worked harmoniously together. The Anglo-American position is this : For practical purposes we have now got a uniform law of bills of exchange throughout the whole of the English-speaking communities. The Bills of Exchange Act, 1882, has been adopted, with or without small variations, by all our important colonies. The Indian Negotiable Instruments Act, though drafted on a different plan from the English Act, accords with it in substance ; and if the Indian rule differs from the English rule in any respect, it is due to the accidents of drafting, and not to intentional divergence. In the United States the Federal legislature has no jurisdiction over bills of exchange. But some years ago the Commission on Uniform Laws drew up a model law of negotiable instruments, and this model law has now been enacted by the legislatures of thirty-five states and

¹ See Blue-Book, p. 115, for list of delegates and their qualifications.

in four territories (Blue-Book, p. 29). The American Negotiable Instruments Law differs in arrangement from the English Act, but accords with it in principle, and in many cases uses identical words. The most important point in which the Anglo-American laws diverge is the maturity of bills payable otherwise than on demand. Nearly all the states in the United States and some of the English colonies, following the continental lead and the dictates of convenience, have abolished days of grace. The rule that when a bill falls due on a common law *dies non* it is payable on the preceding day, while if it falls due on a bank holiday it is payable on the succeeding business day, is an eccentricity peculiar to the United Kingdom, and the sooner it is altered the better. The English delegates had no hesitation in recommending that days of grace should be abolished, and that when a bill falls due on a non-business day it should in all cases be payable on the next succeeding business day (Blue-Book, pp. 78 and 81). The fact that we have now got a uniform system throughout the English-speaking world makes us very loth to consider changes in our law, even though they may not be undesirable in themselves. Apart from the dislocation of business that follows from changing an old and well-known rule, we dislocate the whole Anglo-American system. If, for example, England or one of the states of the United States adopts some continental rule (*e.g.* the requirement that every dishonoured bill and note should be protested), the uniformity of the Anglo-American system is broken up until some fifty to sixty legislatures have agreed in approving the change. But an International Conference can only proceed on the principle of give and take. The nations which have nothing to give have rather to stand aside from the action of the piece, and take the part of the chorus in a Greek play. We could only argue in favour of our rules on abstract principles of convenience.

From the Anglo-American point of view the procedure adopted at the Conference was unfortunate. When questions were raised on which opinions differed, divisions were taken on the principle of "one nation one vote," and the question was decided by simple majority of votes. A good many points were carried by very small majorities. When great commercial interests are at stake, it is not very satisfactory that the combined vote of England and the United States should be neutralised by the votes of Hayti and Montenegro. But it is difficult to see what other system could have been adopted. If votes had been apportioned in proportion to the populations represented by the various delegations, no doubt matters would have been equalised as between the Anglo-American and the continental systems, but China would have had an overwhelming vote. Votes proportioned to commercial interests could only be based on unreliable estimates, and would not, I think, be acceptable to our continental friends.

Early in the Conference the question was raised whether an attempt should be made to draft a Uniform Law for general adoption, or whether the Conference should confine itself to discussing the points of divergence in

the various national laws, and then formulating resolutions as to the rules to be adopted. We, of course, were in favour of the latter plan. We should have liked to have had the resolutions formulated with the names of the countries which supported or opposed them, and a brief abstract of the reasons for or against them. But the almost unanimous opinion of the Conference was in favour of the former course. In the result the deliberations of the Conference have produced a draft Convention and draft Uniform Law for general adoption. Thirty-one nations signed the Protocol agreeing to the Convention, three nations have not signed, but have made no protest. England and the United States formally declared that they could not become parties to any such scheme (Blue-Book, pp. 28 and 149). The draft Uniform Law is to be circulated for criticism to the various Governments which took part in the Conference, and a further Conference is to be summoned at The Hague next September to consider criticisms and finally pass the Uniform Law.

The procedure by which the Uniform Law was evolved was as follows: The Conference opened with an informal discussion in plenary session of the eighty-nine points raised by the Questionnaire. The Conference was then split up into five sections, each containing the delegates of seven nationalities. The points raised by the Questionnaire were then considered *seriatim*, and new points were allowed to be raised. The opinions of the different nations were elicited, and then the report of the proceedings of each section was presented to the central committee. The central committee was composed of the five presidents of the sections, the five *rapporteurs*, five expert members, *i.e.* bankers and merchants, and five other selected members, representing in all about fifteen nations out of the thirty-five. Mr. Huth Jackson and myself served on the central committee, but our United States colleague unfortunately did not. Taking as the basis of its discussions the reports of the five sections, the points raised were again gone through, and when opinions differed, votes were taken, and the questions were decided by simple majorities. The conclusions of the committee were then drawn up by the very able *rapporteurs* of the committee, MM. Lyon Caen and Simons. They were presented in print within two days of the termination of the committee, not as resolutions, but in a series of articles forming a complete draft law (Blue-Book, pp. 28 and 48).

These articles were then brought before the Conference in plenary session, and were passed in one sitting without amendment and with very little discussion. The committee on Private International Law then submitted their report, and submitted three draft articles, which were agreed to by the Conference. These articles only deal with conflicts of law, between the parties to the Convention, on points which by the Convention are left to be settled by national law, *e.g.* whether a bill must be presented on its due date, or whether, as the Uniform Law provides, the holder may present it either on its due date or on either of the two succeeding days. The *rapporteurs* of the central

committee, and the *rapporteurs* of the International Law Committee (MM. Renault and Kriege) were then instructed to incorporate the three articles on the conflict of laws into a preliminary draft of the Uniform Law, making at the same time any necessary drafting alterations. The next day the combined work of the four *rapporteurs* was presented to the Conference in the form of a draft Convention and Uniform Law, and this draft, after some desultory discussion, was adopted by the Conference without division. England and the United States merely stated their reasons for standing aside (Blue-Book, p. 28).

To any one who knows the difficulty of drafting a code, the work of the *rapporteurs* of the central committee, who produced a complete draft code immediately after the conclusion of the labours of the committee, must seem like a modern miracle. But there is an explanation. The Germans, with their usual thoroughness and forethought, had prepared and circulated a draft code (in French and German) before the Conference met. On the whole the votes of the central committee, largely influenced by the tact and ability of M. Simons, one of the German delegates, supported the views of the German draft, and so that draft was capable of being used as a basis, the necessary amendments being engrafted on to it. Still, even with this great aid, the *rapporteurs* accomplished a notable piece of work.

Next year the Conference will meet again to complete its work, but I venture to think that England and the United States must still continue their attitude of benevolent neutrality. Some of the more obvious reasons for this attitude may be briefly indicated.

The draft Uniform Law differs very considerably from the Anglo-American system. Mr. Huth Jackson and myself have drawn up a memorandum commenting on thirty-nine questions of more or less importance where the two systems differ (Blue-Book, p. 75), and a prolonged comparison of the Uniform Law with the Bills of Exchange Act will probably disclose a good many more. In several cases the rules of the Uniform Law appear to us to be commercially inconvenient, as for instance the rule which nullifies a bill which is issued undated, it may be by accident, the rule that the holder cannot refuse a partial acceptance, and the complicated rules as to notice of dishonour. Again, the Uniform Law, quite rightly, applies alike to inland and foreign bills and notes. It would be highly inconvenient for the countries which adopt it to have each two codes, one applicable to foreign and the other to inland bills. But we should object in England to have every dishonoured bill and note protested, and we should also object to the commission of $\frac{1}{2}$ per cent. in addition to the ordinary damages. The rule that every holder of a bill is entitled to demand a set, even though the bill is issued as a sola bill, is capable of vexatious abuse. The general attitude of the continental codes differs from the English view. Our English law in the main reproduces the usages of bankers and traders. The continental codes have been framed for bankers and traders by their respective legislatures.

Speaking broadly, the continental codes tell bankers and traders what they may do. They start with a normal trade bill and then carefully police it throughout its whole career. English law tells its citizens what they may not do, but, subject to the avoidance of things prohibited, leaves them free to make any arrangements they like.

But apart from differences in the two laws, there are cogent reasons why we should not become parties to the Convention. It is proposed that the nations who adopt the Uniform Law should adopt it, not by independent legislation, but by convention, that is to say it must be adopted in its entirety, without addition, derogation, or alteration, except so far as certain points are by the law itself left open to restricted modification by the national legislatures. The contracting parties are as far as possible to adhere to the Convention for their colonies as well as for their own territories. They may enact the law either in French or by translation, but in case of doubt, the original French document is the authorised version. No modifications in the law can be made for three years, but after that time any five contracting States may require the Netherlands Government to summon a Conference to consider alterations (Blue-Book, pp. 120-5).

One cannot imagine the English Parliament adopting a code made on the Continent at a Conference where the English vote was of little account and accepting it without powers of revision or effective discussion. The only points that could be debated would be (1) acceptance or rejection as a whole, and (2) the correctness of the translation. It would be amusing, if not instructive, to hear the House of Commons discussing the exact English equivalent of French technical terms and phrases.

But assuming that Parliament could be induced to swallow the Uniform Law blindfold, the result would not be complete uniformity. On the Continent the Uniform Law would be fitted in to the existing commercial codes, and would be administered by tribunals of commerce as a part of those codes, and with the appropriate special machinery. The decisions of those tribunals do not, I believe, constitute binding precedents, and the somewhat loose, though pregnant, provisions of their codes seem to be treated rather as authoritative instructions to the judges than as we regard an Act of Parliament. In England the Uniform Law, if adopted, would be immersed in the common law, and would be construed by the civil Courts like any other statute, in accordance with the highly technical rules of statutory construction. Our Courts minutely weigh and criticise every word and phrase of a statute, dealing with it as if it were a matter of verbal inspiration. The fact that the authorised version would be the French original at the Hague would add to the complication. There is also another objection. The Uniform Law deals only with bills of exchange and promissory notes payable to order. It has no application to cheques or to promissory notes payable to bearer. We should therefore require separate enactments to deal with these instruments, and this, to say the least of it, would be embarrassing.

The reason why the Uniform Law is so restricted appears to be this. The continental laws look very much askance at instruments payable to bearer, and in some countries notes to bearer are absolutely prohibited. Again, with us a cheque is merely a bill of exchange, drawn on a banker, and payable on demand. All its special incidents flow from the fact that it is drawn on a banker. On the Continent a cheque is not necessarily drawn on a banker, and is not a bill of exchange. It has some of the incidents of a bill of exchange, but is really an instrument *sui generis*, and of comparative novelty.

But though England and the United States cannot become parties to the Uniform Law, it by no means follows that the Conference will not be productive of great good. In the first place the friendly interchange of views between the delegates of so many nations is profitable in itself. In the second place we hope that in September next the nations which have approved the draft Convention will adopt the Uniform Law. In that case a great step forward will have been made. Instead of the present multiplicity of laws relating to bills of exchange we shall have only two great systems, namely, the Anglo-American and the Continental. That alone ought greatly to simplify the transactions of international commerce. We may fairly hope, too, that when these two great rival systems are brought face to face, many of the points of conflict will gradually be removed. On some few points the rules of the Uniform Law are more convenient and equitable than our rules, and we should improve our law if we adopted the continental rule (Blue-Book, pp. 75 and 81). On some other points, one rule is as convenient as the other, and it might be worth while to adopt the continental rule for the sake of uniformity, if the other nations would be willing to act on the principle of give and take. But perhaps it is well not to be too sanguine in these matters. It is difficult to induce Parliament to make any change in the law where the impetus of party prejudice or passion is wanting. Moreover, any change in accustomed rules creates temporary disturbance in business. Most people are agreed that it would be a vast improvement if we adopted the decimal system in our coinage, weights, and measures. Posterity certainly would bless us if we did. But then posterity has done nothing for us. We firmly decline to put ourselves about for the benefit of posterity when posterity cannot do anything to repay us for our trouble.

NOTES ON LAND TAXATION IN ENGLAND.

[Contributed by WALLWYN P. B. SHEPHEARD, ESQ., M.A.]

Roman Period.—The taxation of land has always originated such primary questions as to whether the taxation should be upon the area of the land itself, or upon its produce; and in either case specific, per unit of surface or annual produce, or ad valorem.

An examination into the taxation of land in England throughout successive periods involves some consideration of the system of taxation which prevailed in Britain when a Roman Province.

By Roman law conquest vested the land of the conquered people in the victorious State; it was confiscated, and became *ager publicus*. On the close of the war such land, if in cultivation, was dealt with in some one or other of the following ways: (1) By sale in full ownership (*agri quæstorii*); (2) by grant in full ownership to Roman citizens (*agri dati adsignati*); (3) by restoration to former owners (*agri redditii*); (4) by lease at rent either in kind or money (*agri vectigales*). All mountain pastures and woods were either granted (*concessa*), sometimes to the old proprietors, and sometimes to a Roman colony or municipality, or reserved as *ager publicus* by the State; when a rent was payable they came under the head of *agri vectigales*. Pastures were sometimes appropriated to individuals, but held pro indiviso; sometimes made common to the adjacent community. Taxes were collected on the cattle by the tax-farmers (*publicani scriptuarii*); the revenue appeared in the Censor's book as *pascua*. The general term of *possessores* was applied to the occupants of public land in the provinces to distinguish them from the absolute (*quiritarian*) owners.

At the period of the revolt of the Britons under Boadicea, the conquered inhabitants were subjected to the severest exactions. They are indicated by Dion Cassius in the following passages from the Queen's oration to her army:

You have learnt by your own experience how much liberty is to be preferred to servitude, insomuch that if there were some among you who, through an incapacity of making a good choice, had formerly suffered themselves to be surprised by the false promises of the Romans, they would at this time acknowledge the fault they had committed in renouncing the government of their country to submit to foreign authority. . . . What usage—how shameful and how cruel—have you not undergone since these strangers came into Britain? Have we not been deprived of all our best and largest properties, and forced to pay them tribute out of the remainder?

Is it not for them that we are obliged to labour and till the ground, and do they not force us every year to give up some of our children for tribute? . . . But why should I mention the impositions they lay upon us during our lives, since we are not exempt from them at our deaths?

Do you not feel the weight of that impost which they compel you to pay for those who have paid to nature the last tribute which all mankind owes her? There is no country where the slaves are not freed at the end of their lives from the power of their masters. The Romans alone have found the secret of restoring life in some measure to those who have lost it in order to still exact from them the wherewithal to satisfy their avarice. But if we have no money, as how should we have any, and where can we get it? we are left as naked as those who are murdered.

The condition of the Britons was improved by Agricola, who completed the conquest, and, as additional territory was acquired, Britain ultimately came under all the various provisions for taxation settled by the *forma provinciæ*. Among such provisions would be the following:

The *annona*, or yearly corn-tax, paid in kind, and applied in supporting the civil and military officials in the Roman province. The poll-tax (*tributum capitis*); the imposts on mines; the dues from *portoria*; the 5 per cent. duty on legacies, paid only by Roman citizens in Italy until after the edict of Caracalla (A.D. 215); a duty of 1 per cent. (*centesima*) on *res venales*; and of 4 per cent. on the purchase-moneys of slaves. Towards the end of the third century Diocletian divided the Roman Empire into twelve *διοικήσεις*, each of which comprised a number of provinces; in the *διοίκησις* of Britain there were four provinces.

Each *διοίκησις* was under a deputy governor (Vicarius), answerable only to the *præfectus prætorio*; the governors of the provinces were *proconsuls*, *consulares*, or *proesides*; the empire was resurveyed for financial purposes, and all taxation, so far as it affected the land, was based on a division of the soil into *juga*, each division, though differing in acreage from others according to its fertility, being rated in the same value. The *Jugum*, or *Jugerum*, was a little over 2 roods 19 perches, or almost five-eighths of an English acre. It was the quantity of land which could be ploughed by a yoke of oxen in one day.

In provinces which submitted voluntarily a tenth of the corn (*frumentum decumanum*), and in those which were conquered an arbitrary quantity of corn (*frumentum stipendiarium*) was exacted.

Britain as a Roman province was divided into *Coloniæ*, *Municipia*, Latin cities and *Stipendiary towns*, and in each of these divisions Roman citizens would be favoured in many respects as compared with the British inhabitants.

This sketch of taxation in Britain is sufficient to show that the general principles of Roman taxation, except the early Roman *tributum* payable by *quiritarian* owners of land, were in force.

As the conquered country became an imperial and not a senatorial province, its revenue was paid into the privy purse of the Emperor (*fiscus*), and not into the municipal treasury of Rome (*Ærarium*). The Roman

conquest involved the confiscation of all the land and belongings of the British inhabitants, who by the laws of war were reduced to slaves.

This direct result of conquest was, however, modified by the *forma provincie* drawn up by the Consul commanding the army of occupation. But the Britons were forced to pay away both in kind and in money a large portion of the annual produce of their agricultural labour, and the native wealth thus exacted went to swell the coffers of the Roman emperors and defray the civil and military expenses in Britain of the Roman administration. By the act of confiscation the land came into the absolute ownership of the conquering State, and the subsequent revenue derived from the possessores was rather in the nature of rent payable out of its annual produce than of taxation. The Roman taxation of land held under quiritarian ownership was in effect an income-tax on Roman citizens in respect of their whole property, including their lands, such citizens and the value of their property being entered on the Census.

(To be continued.)

A SCHOOL OF INTERNATIONAL LAW.¹

[*Contributed by* W. R. BISSCHOP, ESQ., LL.D.]

Resolution.—That in view of the approaching opening of the Permanent Palace for a Tribunal of International Arbitration at The Hague, and in the interest of strengthening the efficiency of that Tribunal as a Court for the solution of international difficulties and the continuity of its decisions, it is desirable that steps be taken to establish in connection therewith a school for the study of international law in all its branches, and that the Executive Council be requested to co-operate in any movement which may be made for the realisation of this idea.

IN proposing this resolution, nothing new and unheard of, nothing excitingly fresh is put forward, but simply a further step advocated in the development of the idea which prevailed when the delegates of the nations were assembled to a Peace Conference at The Hague, and an International Court was established for the settlement of disputes among nations.

International arbitration is no longer considered as belonging to the domain of never-to-be-realised ideals. It has become a fact, it exists. It has to be popularised, to grow and gradually to extend its influence until it has become so common and natural that it is considered part and parcel of the international intercourse between nations.

One of the steps in this evolution is to render the law of nations a subject of scientific study at the very seat where that law has to be formulated by the international arbitration, where it has to be pronounced, to be observed, to be sanctioned and to be moulded into the common law of the world.

True, the law of nations, international law, is a subject of study at more than one university, and it is to be hoped that it will not only remain a subject of study, but will once become an obligatory part of a qualification for any law degree at all universities of civilised nations.

While, however, the study of international law should not be absent from any school of law, at the same time a school of law, of international law, should not be wanting at the seat where that international law has to be practised. In the same way as the Inns of Court and their legal education

¹ A paper read before the Conference of the International Law Association in the Guildhall, London, August 2, 1910.

were the corollary of the King's Courts of Justice in England, so the school for the law of nations should be the corollary of the Nations Courts of Arbitration at The Hague.

The work done at The Hague International Conferences—misnamed Peace Conferences, for strife will never be ended between nations, and eternal peace there shall only be in death—is of a twofold nature.

(a) **Parliament of Nations.**—It created an assembly of representatives of all nations for the discussion of subjects of mutual interest. Though these subjects were limited in the first Conference of 1899 to the items of a previously carefully prepared programme, they were extended in the Conference of 1907, and their tendency is to enlarge and to grow, as is the tendency of all discussions at assemblies of representatives of the human race.

If these Conferences are to be repeated—and the reassembly of the nations' representatives in the near future is not altogether of a hypothetical character—they are destined to become assemblies for the preparation and establishment of rules of international law, to be observed by all, as they received the consent from all.

For such development there must be continuity (1) in the regularity of these Conferences, (2) in the continuation of business done at further conferences by following Conferences. For such continuation—in order to be fruitful—there should, in the meantime, be preparation, digestion of the resolutions adopted at the former Conferences, popularising of the ideas brought forward.

(b) **Court of International Arbitration.**—The second work done by The Hague Conferences was the creation of a Court of international arbitration, a means of solution of difficulties between nations by other methods than the arbitrament of war.

It was the creation of a permanent tribunal for international arbitration which marked the commencement of extending civilisation, which is observed between individuals, to nations.

“The time is coming when war between nations will be looked upon as barbarous as the duel between individuals is to-day. When two citizens quarrel we do not allow them to be judge in their own dispute and settle the matter by taking the law into their own hands. Before an impartial tribunal their dispute must be brought; and what is good for individuals cannot be bad for nations, which are simply an aggregation of individuals.”

Several proposals were made at the Conference of 1907 to establish a compulsory Arbitration Court. Unanimity on that point was not obtained. Yet the idea found favour in many eyes, and it is not insignificant that recently the following declaration fell from the lips of President Taft: “Personally I do not see any more reason why matters of national honour should not be referred to a Court of Arbitration than matters of property or of

national proprietorship. I know that is going farther than most men are willing to go, but I do not see why questions of honour may not be submitted to a tribunal composed of men of honour who understand questions of national honour, to abide by their decision, as well as any other question of difference arising between nations."

Also in this respect there should be continuity, not a series of decisions which do not maintain reference to each other. Precedents should be created and precedents should be followed. Gradually there should be built up—in the words of Professor Nippold—"eine völkerrechtliche Judikatur"—a jurisprudence regarding the law of nations, a *lex communis inter nationes*.

In order to obtain such continuity the Court should have its school, its teachers, its disciples. As it has received its Palace and its Library, it should have its pupils eager to learn how to continue the building up of the true law of nations.

It has already been stated that this idea is not a new one. It has found its advocates and supporters among the highest and most influential, the most learned and the most sagacious among the men of the world, who, though divided by nationality and different occupations in life, unanimously recognise the desirability of promoting the study of the law of international intercourse at the centre where it is vindicated.

It was perhaps Professor von Bar who in 1900 first launched the idea of an international school of law at The Hague, of which the legal opinions would carry even greater weight than the decisions of the international tribunal, in the same way as the *responsa* of the jurisconsults in Rome, and the opinions of Grotius and other men learned in law of Roman-Dutch law.

Next I want to mention the Russian diplomat and scholar, his late Excellency M. von Martens of Petersburg, who in a speech which he made in Vienna in the winter of 1906-7 dwelling upon the idea of a University of International Law at The Hague called that idea "noble and worthy of consideration" (edel und beherzigungswerth).

The remarks passed by these men and others were followed by a carefully conceived and worked-out study by the Swiss Professor Ottfried Nippold of Berne in the *Deutsche Revue* of April and December 1907, and December 1908.

I make special mention of these articles of Professor Nippold, not only because they are the most complete treatise on the utility and necessity of an international school of law at The Hague, but, above all, because the first of these articles (April 1907) gave an opportunity to the President of the second Peace Conference at The Hague, his Excellency M. Nélidow, then Russian Ambassador in Paris, at the beginning of the third plenary sitting of that Conference on July 20, 1907, to express his sympathy with this idea in the following terms :

Je voudrais, avant de terminer, faire mention d'une communication particulière ou plutôt d'une suggestion intéressante qui m'est parvenue. M. Richard Fleischer, rédacteur de la *Deutsche Revue*, m'a envoyé un numéro de son journal dans lequel le Professeur Ottfried Nippold, de Berne, recommande à la Conférence la création à La Haye auprès du Tribunal d'Arbitrage d'une école centrale de droit international qui servirait à répandre les saines notions en cette matière et les enseigner à ceux qui seront plus tard appelés à les appliquer.

Ce serait, j'imagine, un cours de droit réuni à une académie qui en étudierait et conserverait les principes continuellement rajeunis par la pratique que leur donnerait le fonctionnement du Tribunal Suprême d'Arbitrage : quelque chose comme un "asklepion" qu'avait fondé à l'île de Cos Hippocrate pour la science médicale.

J'ai cru devoir citer cette intéressante suggestion, car je la trouve sympathique et capable de rendre, si l'idée était appelée à prévaloir, de grands services à la cause que nous servons tous. Peut-être la mention qui en est faite ici et qui rencontre, j'espère, la sympathie de la Conférence, pourra-t-elle inspirer à quelque généreux donateur l'idée de vouloir, à l'exemple de Mr. Andrew Carnégie, immortaliser son nom en l'attachant à un établissement qui servira puissamment la cause de la paix et de la justice internationale en contribuant à en répandre les principes et à lui préparer de dignes serviteurs.

The second Conference did not stop there. Encouraged by the words spoken by its President at the opening of the third plenary meeting, the Roumanian statesman and representative at the Conference, his Excellency Demetrius Sturza, submitted to the Conference a carefully worked out plan for an international school of law at The Hague, which may one day serve, as President Nélidow observed at the opening of the fifth plenary meeting (September 7, 1907), as a plan for such a school when the pacific institutions which the Conference wishes to organise in The Hague have sufficiently developed to create a continuity of international law and a judicial practice which one day will demand to be codified.

His words were the following :

Vous voudrez bien vous souvenir, messieurs, que dans notre troisième séance j'ai eu l'honneur de vous signaler une suggestion qui m'a été faite à ce sujet par le rédacteur d'une revue allemande.

Elle a poussé l'éminent homme d'état Roumain, épris de l'idée du développement du droit des gens, à élaborer un projet que je dépose dans les archives de la Conférence. Il pourra peut-être servir un jour à faciliter la réalisation de cette idée, si elle était appelée à prendre corps, lorsque les institutions pacifiques que la Conférence veut organiser à La Haye auront été suffisamment développées pour créer une continuité de droit international et une pratique judiciaire qui demanderait à être codifiée.

The plan of his Excellency Sturza was accompanied by a letter, of which I quote the following passage :

La Conférence de la Paix poursuit un grand but : celui d'arriver à régler pacifiquement les conflits internationaux.

On a établi à cet effet en 1899 une Cour Permanente d'Arbitrage avec la mission

de juger les litiges qui lui seront soumis. La Conférence tâche actuellement de donner à la justice arbitrale un développement encore plus considérable. Ce serait donc le moment de créer entre la juridiction internationale et la Conférence un lien, qui ne peut être un autre que celui de la science, afin que la pratique et la théorie puissent marcher de pair en s'entraïdant mutuellement. Il siègerait alors à La Haye une institution complète du droit des gens, dont la direction serait confiée à la Conférence de la Paix, l'exécution pratique au conseil administratif permanent institué en 1899, et le développement scientifique à une académie du droit des gens qui maintiendrait d'une manière méthodique la science à la hauteur des principes énoncés par la Conférence et la pratique à la hauteur des progrès inaugurés.

The plan itself is as follows :

Ayant en vue la nécessité de développer d'une manière méthodique le droit des gens et son application pratique dans les relations internationales, la deuxième Conférence de la Paix siégeant à La Haye décide de créer une académie du droit des gens et de l'établir sur les bases suivantes :

Art. 1. Une Académie du Droit des Gens est fondée à La Haye.

Art. 2. Les membres de cette académie seront élus parmi les savants, les professeurs d'universités et les jurisconsultes les plus éminents de tout pays et d'une compétence reconnue dans les différentes matières du droit des gens, telles que—droit international public et privé, droit de guerre, droit commercial comparé, systèmes du commerce et relations économiques, systèmes coloniaux, histoire du droit des gens.

Les cours de l'académie du droit des gens de La Haye se feront indistinctement en allemand, en anglais, en français et en italien.

Art. 3. Le nombre des membres de l'académie du droit des gens de La Haye ne sera pas supérieur à celui de dix. Ces membres seront nommés pour une période de . . . par la seconde Conférence de la Paix de 1907.

Les cours annuels de l'académie du droit des gens se tiendront pendant les mois de mai, juin et juillet. Ils prendront leur commencement le 1^{er} mai 1908.

Art. 4. Les frais de l'académie du droit des gens de La Haye seront prélevés sur les contributions des Etats représentés à la seconde Conférence de la Paix de 1907, qui adhéreront à la création de l'académie.

Chaque Etat adhérent déclarera la part contributive qu'il s'oblige à payer et qui s'élèvera de 2,000 à 4,000, 6,000, 8,000 et 10,000 francs.

Art. 5. Le conseil administratif permanent de La Haye constitué par l'art. 28 de la Convention pour le règlement des conflits internationaux de 1899 est chargé de l'administration intérieure et des fonds de l'académie du droit des gens à La Haye et fixera la rémunération des membres de cette institution internationale.

Art. 6. Dans le cas où cette académie prendrait un développement nécessitant un local spécialement aménagé et destiné à cet effet, le conseil administratif permanent de La Haye s'adresserait aux Gouvernements des Etats adhérents pour réunir les fonds nécessaires.

Art. 7. Chaque Etat ayant adhéré à la création de l'académie du droit des gens de La Haye a le droit de désigner pour fréquenter les cours de cette institution des diplomates, des militaires, des employés des administrations supérieures des Etats et des savants.

Le nombre des envoyés aux cours de l'académie sera en proportion des contributions de chaque Etat, à savoir—deux, quatre, six, huit et dix.

Of course, these are not the only utterances in favour of such proposition. I have only given these to mark the steps by which the progress of the idea can be followed, the stepping stones on its way to realisation.

I hope that the International Law Association will add a new landmark on that road of progress and evolution by passing this resolution as a mark of adherence by men of practice to the ideas developed by men of learning and diplomats.

MERCHANT SHIPPING LEGISLATION OF THE EMPIRE.

[Contributed by A. BERRIEDALE KEITH, ESQ.]

THE confused position of Merchant Shipping legislation throughout the Empire is strikingly illustrated by a recent decision of the Court of Appeal of New Zealand, in the case of the *Huddart Parker & Company Proprietary (Limited) v. Nixon*.¹ In that case the plaintiff was a proprietary company incorporated under the State of Victoria, and owning steamships which were registered in Melbourne, although the company had agency offices in New Zealand. These steamships traded with New Zealand and were engaged in the coastal trade. The seamen and officers were engaged on articles signed in Melbourne or in Sydney which were for six months and fixed the wages of the persons employed. The wages were paid by monthly advances at Melbourne or Sydney according to the place of engagement. The wages in question were in some cases equal to or greater than the current rate of wages payable in New Zealand, but were in some cases less than the current rate of wages. The wages were fixed by an award of the Commonwealth Court of Conciliation and Arbitration which was constituted by virtue of the Commonwealth Conciliation and Arbitration Act, 1904.

The Marine Department of the New Zealand Government claimed that while the ships were in New Zealand ports, and while they were trading between two New Zealand ports, they were subject to the provisions of s. 75 of the Shipping and Seamen's Act, 1908, of the Parliament of New Zealand. That Act² provides that in the case of seamen engaged in New Zealand or engaged abroad but employed in New Zealand, the seamen while so employed shall be paid and may recover the current rate of wages for the time being ruling in New Zealand. It also provides (sub-s. 2) that the Superintendent of the port at which a ship loads or discharges cargo carried coastwise shall notify the master of the ship of the provisions of the section, and the Superintendent is empowered to have the ship's articles endorsed so as to show clearly the amount of wages payable. By the next sub-section the Collector of Customs is authorised to detain the final clearance of the ship until he is satisfied that the crew has been paid the current rate of wages ruling in New

¹ [1910] 29 N.Z.L.R. 657.

² Its provisions are followed in the Navigation Bill recently introduced into the Commonwealth Parliament; see s. 92.

Zealand, or any difference between the agreed rate of such wages and the New Zealand rate of wages. The company held that they were only obliged to pay the rate of wages provided for in the articles, and the questions submitted to the Court were whether s. 75 of the Shipping and Seamen's Act, 1908, applied to the company's ships while in New Zealand ports, and while at sea between New Zealand ports; whether the Superintendent of Mercantile Marine had the right to endorse the articles of the company's ships as provided in sub-s. 2 of s. 75 of the Act, and whether seamen employed on the company's ships could sue in New Zealand for the current rate of wages ruling in New Zealand, notwithstanding that a different rate of wages was fixed by the ship's articles.

It was argued by the counsel for the plaintiff company that s. 75 of the Act was *ultra vires* as being contrary to the provisions of the Imperial Merchant Shipping Act, 1894. It was pointed out that as regards ships registered in the United Kingdom, s. 166 of the Merchant Shipping Act of 1894 provided that when a seaman was engaged for a voyage or engagement which was to terminate in the United Kingdom, he should not be entitled to sue in any Court abroad for his wages except under certain circumstances which did not arise in the case in question. To a ship registered in England the provisions of s. 75 could therefore not apply, and it was argued that the case was not different with regard to ships registered in Victoria inasmuch as s. 736 of the Imperial Act permitted only the regulation of the coasting trade on condition that it applied equally to ships wherever registered. If, then, ships registered in the United Kingdom were exempt from the provisions of s. 75, and ships registered in Victoria were not, the condition laid down in s. 736 of the Imperial Act would be invalidated and therefore s. 75 must be held as not applicable to ships other than those registered in New Zealand. It was also pointed out¹ that the section would be ineffectual since there was nothing to prevent the company from deducting the extra amount paid in New Zealand from the wages which it paid in Victoria.

It was also argued that if the opinion of the Chief Justice of New Zealand in *Re the Award of the Wellington Cooks' and Stewards' Union*² was followed, to the effect that a ship registered in New Zealand was part of the territory of New Zealand, then a ship belonging to the plaintiff company was part of the territory of Victoria even in a New Zealand port. The case of the *Peninsular and Oriental Steam Navigation Company v. Kingston*,³ which was the authority for the doctrine that a ship engaged in coastwise trade was subject to the law of the country along which it was coasting, had no application to New Zealand, for it depended on the special provision of s. 5 of the Commonwealth of Australia Constitution Act, 1900. For the defence it was argued that the power which had been exercised under s. 75 of the Act was expressly conferred by s. 736 of the Imperial Merchant Shipping Act of 1894. It

¹ Quoting *Journ. Soc. Comp. Leg.* 1908, p. 208.

² 26 N.Z.L.R. 394.

³ [1903] A.C. 471.

was not admitted that the plaintiff company could deduct the amount paid in New Zealand when its vessels reached Melbourne, but whether it could or not was no concern of the Court, which must administer the law of New Zealand and leave the effect of its decision in Victoria to be determined by the Victorian Courts. The power to regulate the coastal traffic included the power to regulate that traffic while outside territorial waters.

The Court decided in favour of a limitation of the validity of s. 75 of the Act by majority, Stout C.J. and Williams and Chapman JJ. being on two points agreed against the dissent of Edwards J., while on another point Edwards and Chapman JJ. agreed, though the latter withdrew his opinion as junior judge. The Chief Justice,¹ while adhering, despite criticism, to the views which he had expressed in the *Wellington Cooks' and Stewards' Union* case, pointed out that different considerations were involved in this case. He held that s. 75 was *ultra vires* so far as it purported to authorise seamen engaged on a British ship for a voyage on an engagement made in the United Kingdom to sue for wages abroad, as this power was repugnant to s. 166 of the Merchant Shipping Act, 1894. Nevertheless s. 75 did, except in this particular, apply to all ships wherever registered if engaged in the coasting trade, in accordance with the power given under s. 736 of the Imperial Merchant Shipping Act, 1894. In the case of vessels registered in Victoria, the position was somewhat different; but as they were registered and controlled by Statute which the Imperial Legislature authorised the State of Victoria to pass, they ought to have the same protection as British ships registered in England. He therefore held that power to endorse the articles had been properly vested in the Superintendent of Mercantile Marine, and that a seaman could sue in the Courts of New Zealand for the extra wages which were due to him, but not for the wages provided in the articles.

Williams J.² said that the provisions of s. 75 were authorised by s. 736 of the Imperial Merchant Shipping Act of 1894; he was inclined to agree that in so far as s. 75 purported to give a seaman the right to sue for wages in the articles, it might be repugnant to s. 166 of the Imperial Act, and to that extent void, though he was not quite so distinct on this point as the Chief Justice. On the other hand, Edwards J.³ held clearly that s. 75 was *ultra vires* as conflicting with s. 166 of the Imperial Act, and that therefore the seaman was neither entitled to nor could sue for the extra wages. It was therefore illegal for the Collector of Customs to refuse a clearance. He recognised that there was a distinction between ships registered in Victoria and ships registered in the United Kingdom, and that strictly speaking the New Zealand law could not be regarded as being repugnant to a Victorian Act, but he relied on the argument that if a distinction were

¹ 29 N.Z.L.R. 657, at pp. 662 *sq.*

² 29 N.Z.L.R. 657, at pp. 666 *sq.*

³ 29 N.Z.L.R. 657, at pp. 670 *sq.*

made in the treatment of ships registered in the United Kingdom and ships registered in Victoria, the purpose of s. 736 of the Imperial Act, which requires that vessels should be treated alike wherever registered, would be defeated, and therefore that s. 75 must not be held to apply to vessels registered in Victoria. He also called attention to the unfairness of the position which would result from enforcing s. 75. In several cases the wages under the articles were greater than those payable in New Zealand, and yet the owners could not reduce the wages on that ground, whereas they were required to increase the wages in the cases in which they were not equal to those payable in New Zealand.

Chapman J.¹ agreed in substance with the Chief Justice and Williams J., but not on the grounds given by them for their decisions. He reconciled s. 136 of the Imperial Act with s. 75 of the New Zealand Act on the ground that the two sections dealt with totally distinct matters. The New Zealand Act provided for an addition to the wages of the crew to be enforced not by suit in the Courts, but through the action of the Collector of Customs in refusing a clearance, so that there was no real discrepancy between the Imperial and the local Acts.

It is not exactly easy to follow the judgment of the majority of the Court. They were not apparently prepared to claim that the power of regulating the coasting trade conferred upon the New Zealand Parliament by s. 736 of the Imperial Act of 1894 extended to altering a provision of the Imperial Act.²

On the other hand, they held that the New Zealand Parliament could alter the effect of the Imperial Act by changing the rate of wages of a seaman engaged for a voyage which was to terminate in the United Kingdom, and by giving him a right to recover by action in the New Zealand Courts the difference between the wages payable to him under his articles and the wages current at the time in New Zealand.

It is difficult to see how direct repeal of a provision of an Imperial statute differs substantially from the power claimed for the Dominion Parliament by the majority of the Court. It is clear that the intention of the section of the Imperial Act in question is that a seaman shall be entitled normally only to sue for wages in the United Kingdom, and the wages in question are clearly those stipulated for in his agreement. To give him the right to higher wages during a portion of his service, and to enable him to sue for the difference between his ordinary wages and the higher wages, is in everything but form to alter substantially the section of the Imperial Act. It is difficult to question why the majority of the Court were not content to hold that the power to regulate the coasting trade was sufficiently wide to enable the Parliament to repeal provisions of the Imperial Act which would other-

¹ 29 N.Z.L.R. 657, at pp. 674 *sq.*

² This was, it seems, asserted for the defendants, quoting Keith, *Responsible Government in the Dominions*, pp. 192-4; see 29 N.Z.L.R. at p. 661.

wise normally apply. It may indeed be doubtful as a matter of history whether, in giving in 1869 to colonial Parliaments the power to regulate the coasting trade, it was meant to do more than confer upon the Parliaments the right of opening or closing that trade to such vessels as they thought fit; but the Act must be read not with regard to the original intention of the clause, but to the effect of the wording, and the power to regulate the coasting trade as given in the Act of 1894 is so widely expressed that it seems clear that it must extend to repealing provisions of the Imperial Act which would otherwise be inconsistent with the local legislation.

If this were not the case, the power to regulate the coasting trade which has been conceded by the Imperial Government as belonging to the Parliaments of the Dominions would become little more than meaningless, and it would seem simpler to place on the power of regulating a wider meaning than to accomplish the same result by ingenious efforts to reconcile the provisions of the Dominion and the Imperial legislation. It must also be remarked that in the case in question the provision of the Imperial statute had no application, for not only was the vessel in question registered in Victoria, but the seamen were not engaged for a voyage or engagement which was to terminate in the United Kingdom.

All the members of the Court appear to have acquiesced in the view that the Victorian statute No. 1557, which adopted the provisions of the Imperial Act, 1894, including s. 166, was to be regarded in the light of a colonial statute. The Chief Justice merely said that as the vessels were registered and controlled by statute which the Imperial legislature had authorised the State of Victoria to pass, they ought to have the same protection as British ships registered in England; apparently admitting that the Act had not, strictly speaking, the force of an Imperial Act, and this view was clearly expressed by Edwards J. If this were the case, then it is clear that the provisions of the New Zealand Act could not possibly be invalid, as there was nothing to which they could be repugnant except the law of another Colony. But as a matter of fact, the Court appears to have overlooked the fact that by s. 264 of the Imperial Merchant Shipping Act of 1894, the same effect as that of the Imperial Act itself is given to Acts passed by legislatures of British possessions which applied to British ships registered at, trading with, or being at another port in that possession any provisions of Part II. of the Merchant Shipping Act of 1894 which would not otherwise apply.

The Victoria Parliament by Act No. 1557 applied, *mutatis mutandis*, to ships registered in Victoria the provisions of Part II. of that Act, including s. 166, and it would appear therefore that as a result there is imported into the Imperial Act a provision to the effect that if a seaman is engaged for a voyage terminating in Victoria, he shall not be entitled to sue abroad for his wages. There does not therefore appear to be any substantial difference between the case of vessels registered in the United Kingdom

and vessels registered in a Colony if that Colony has adopted under s. 264 the provisions of s. 166 of the Act of 1894.¹

But whatever grounds the decision is based upon, it is perfectly clear that much confusion will inevitably arise in shipping matters unless some agreement can be come to between the various parts of the Empire as to uniformity of legislation. The Chief Justice of New Zealand, who himself in the case of the *Wellington Cooks' and Stewards' Union* laid down the principle that the whole law of New Zealand accompanies a ship registered in New Zealand wherever it goes, expressly admitted in the course of this case that a ship registered in Victoria was subject while in New Zealand ports and engaged in New Zealand coasting trade to the law of New Zealand. It appears therefore that a vessel registered in the United Kingdom which engaged both in the coasting trade of Victoria and New Zealand will come within no fewer than three jurisdictions at three periods of the voyage, and of course the number would be increased if it resorted to Fiji.

Unquestionably there is much weight in the argument that a vessel which intervenes in the coasting trade of a colony should conform to the conditions applicable to that coasting trade, but the practical result is unsatisfactory when in consequence seamen are entitled to receive higher wages if the wages given in the coasting trade differ from those of the trade in which they are serving, but the owners are not entitled to reduce the wages when the wages paid to the seamen are higher than those in force in the coasting trade. Moreover, as was pointed out in the course of the argument, it is pretty clear that the owners could undo the effect of paying higher wages by taking the extra amount paid from the wages which they pay in Victoria. The possibility of such evasions is recognised in the bill of the Australian Commonwealth in 1910, where it is sought to undo the effect by providing that if a deduction is made from the wages of a seaman earned out of Australia, or he is paid a lesser rate of wages outside of Australia than is usual because he is entitled to a higher rate of wages while the ship in which he served is engaged in the coasting trade, it shall be deemed that the seaman is not paid wages in accordance with the Act while the ship is so engaged in the coasting trade.

Such a provision is clearly necessary if the Act is not to be illusory, and as no such provision exists in the New Zealand Act, its effect will clearly be limited in operation. But on the other hand it is certain that provisions of this kind are difficult to enforce and that the most satisfactory solution will be some arrangement between the Commonwealth and New Zealand which would avoid conflicts such as those which have recently been raised. It might reasonably be agreed that a vessel registered in Australia should pay Australian wages as fixed by the Commonwealth Court of Conciliation and Arbitration while a vessel registered in New Zealand should pay the rates fixed by New Zealand Courts.

¹ The Commonwealth Navigation Bill adopts the principle of the Victorian Act, and thus a conflict between New Zealand and Commonwealth legislation will be inevitable.

JURISDICTION AGAINST FOREIGN STATES.

[Contributed by JULIUS HIRSCHFELD, ESQ.]

THE Russian Government brought an action against von Hellfeld, a German subject, in the Court of Kiao-Chao for the re-delivery of a steamer. Defendant brought a cross-action for the performance of a contract entered into between him and the Russian Government respecting the delivery of arms and ammunition which were to be carried by that steamer, during the Russo-Japanese War.

The Court nonsuited the cross-plaintiff. The Court of Appeal at Shanghai reversed this decision and referred the case back to the Court of first instance. The latter accordingly gave judgment against the Russian Government, which did not appear at the hearing, *in contumaciam*. On the strength of this judgment the Court at Berlin issued a garnishee order against the banking firm of Mendelssohn, with which Russia has a deposit account. The Secretary for Foreign Affairs in Berlin contested before the "Court for the decision of conflicts as to competency" the jurisdiction of the judicial authorities. The latter Court has just given its judgment, which I will briefly summarise :

It is a principle of international law that, apart from the case of immobile property, a foreign State is not subject to the ordinary Courts of a country, no matter whether such State had acted in the exercise of its sovereign nature, or in the capacity of a private person (*privatrechtliche Persönlichkeit*). This proposition implying that the nations cannot sit in judgment upon one another is a necessary corollary to the principle of the equality and independence of the States, and is recognised by the Judiciary of Germany, Austria, France, England, and the United States. From the fact that a Government brings an action in a foreign Court cannot be inferred that thereby it intends to waive its privilege and subject itself voluntarily to an action against itself by the defendant. Furthermore, even if it could be inferred from an adequate act that a submission to a judicial decision had taken place a submission to an execution would on that account not at all follow, judgment and execution being according to German law two distinct phases of procedure. Therefore, even if the judgment by itself were justified, it cannot take effect and must remain a dead letter. Under no circumstances can compulsion be exercised against a friendly State. So far the judgment.

The case had of course agitated the legal world of Germany, and important papers dealing with it were published. Four of them appeared in the Journal for International and Federal States Law (*Völkerrecht und Bundesstaatsrecht*). It will be interesting to note briefly what eminent jurists had to say on the subject.

(i) Professor Kohler of Berlin begins by confessing that he was formerly of the opinion of those lawyers who assume a dual nature in States, the one in which they appear in their sovereign aspect, the other where they act like other juristic persons; and that, though exempt from foreign jurisdiction in their former capacity, they were subject to it in the latter. That he had now reconsidered his position and come to the conclusion that it is impracticable, nay impossible, to draw this distinction; and that in any circumstances jurisdiction against a foreign State should be deprecated, where, as in the present case, it acted in the performance of a national duty. It would be altogether alien to the spirit of the mutual relations subsisting between sovereign States to hold otherwise. It was even doubtful if a State could subject itself to the jurisdiction of another and so divest itself of its inherent sovereign nature. Moreover, the fact that a foreign State brought an action against a person in his country could not be construed as implying a voluntary submission to a counter-claim by the defendant party for this reason, that the foreign State did not voluntarily elect to proceed in the Court in which he did, but was obliged to do so because it was the other party's *forum*. To think otherwise would be tantamount to depriving a foreign State of its remedy. It might perhaps be argued with some show of justification that where a single transaction had taken place involving obligations for each party the Courts might be entitled to consider all the issues and decide whether the private party should be held liable to perform his part of the contract without the State performing its own. And here the Court might perhaps pronounce for the latter performance as a *sine quâ non*. But in any other case such a pronouncement would not only be wrong but altogether null and void. Supposing however, for the sake of an argument, that a judgment against a foreign State could be passed, under no circumstances could it be conceived to be enforceable.

(ii) Professor Laband of Strasburg starts with the proposition that no State can issue orders against another friendly State and decree compelling measures for their execution. It followed that, not possessing these powers, it could not delegate such to its Courts. Modern international law was opposed to the theory of a dual nature of States. On the other hand, the Professor is of opinion that nothing prevents a State from voluntarily subjecting himself to the jurisdiction of another; without however admitting that such subjection can be found in an action being brought in a foreign country. A private party so attacked in his own *forum* can of course defend himself by proving that the plaintiff State has no claim, and the Court would if

satisfied declare this to be the case and nonsuit the plaintiff, but a pronouncement to that effect is essentially distinct from a decision on a cross-action by which a foreign State might be commanded to do an act.

(iii) A very clear paper is contributed by Professor Meili of Zurich, at the request of the Russian Government. He arrives at the same conclusions based on similar considerations. He is of opinion that the exercise of jurisdiction in cases of real property is only a confirmation of, not an exception to, the principle of non-jurisdiction in other cases, inasmuch as such property is to be regarded as part of the territory of the State in which it is situated and can therefore not be made subject to any other jurisdiction but that of such State. He argues that the proposals in the *Règlement du Droit International* only deal with *lex ferenda*, and maintains that though starting from different points of view their conclusions in the present case would agree with his own. He has not been able to discover a case in which the civil action of a private person against a foreign State, without the latter's consent, has been entertained by an English Court. In two decisions, relating to Peru, it was declared that the Court had no jurisdiction. He also refers to the practice and legislation of other countries, and has found everywhere the same attitude, with the only exception of a judgment passed in 1903 by the Court of Brussels against the Dutch State, and an *obiter dictum* in a German judgment (of December 12, 1905) of the Imperial Court, in which it was remarked that a subjection to the jurisdiction of a Court might be implied where a foreign State brings an action in such a Court. He concludes by saying that a judicial tort against the Russian State has been committed by the action of the Court of Berlin and that Prussia must be held liable to indemnification.

(iv) Professor von Seuffert of Munich takes on the whole the same view. He strongly repudiates the opinion of such writers who think that the Courts of a country may have jurisdiction but have no power of execution. According to him there is such a unity between those acts as precludes absolutely the former as much as the latter. A novel point in his paper is the question raised by him whether the issue between Hellfeld and the Russian Government belongs at all to the domain of private law, having regard to the fact that Hellfeld, a subject of a neutral State, contracted to deliver war material at a blockaded port, and whether therefore these contracts are not contraband contracts and altogether null and void.

All these considerations and arguments, in conjunction with the judgment, seem to lead us to these two general propositions: firstly, a contract between a State and a private person is legally binding only upon the latter party; secondly, an obligation entered into by a State cannot be enforced by the creditor. I believe such would likewise be the English law on the subject.

Now these relationships, I submit, are apparently so anomalous and so contrary to the spirit of the law that it is hardly appropriate to apply to

them legal terms such as "contract" and "obligation" and to treat them at all from a legal point of view.

Still, if we had here only to do with misnomers or false designations it would hardly be worth dwelling upon that fact. But owing to a loose and perverse terminology, partly due to carelessness in legislating, a conception of such instruments has crept into the sphere of our municipal law which, in my opinion, is decidedly erroneous. I refer to the case of *Speyer Brothers v. Commissioners of Inland Revenue*, (1907) 1 K.B. 246. There it was decided that a promissory note issued by a foreign State (United States of Mexico) was a "marketable security" within the meaning of the Stamp Act; essentially on the ground that, bills of exchange and promissory notes being by that Act treated as "securities," there was no reason why the instrument in question should not for the purposes of the Act partake of the same nature. Now I submit there is, apart from the nominal purport of the declaration on the face of them, no analogy in law between those two classes of instruments. For not only are bills of exchange and promissory notes recognised and enforceable forms of obligations, but they are also granted certain remedial and processual privileges, giving such creditors in some respects a position of security which others have not. State bonds do not in the eyes of the law embody obligations at all; and it is a mistake to force artificially into a legal category things which have no legal attributes, and to which organically they therefore do not belong. Of course it might be said that as a matter of fact States generally do pay their debts. But does that which is done for reasons of honesty or policy affect the legal aspect of the question?

REVIEW OF LEGISLATION, 1909.

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REVIEW OF LEGISLATION, 1909.

INTRODUCTION.

[Contributed by SIR COURTENAY ILBERT, K.C.B., K.C.S.I.]

THE Review of Legislation for 1909 begins with some important reports on foreign laws.

The Egyptian legislature has been reorganising the constitution and procedure of the Courts, civil, criminal, and religious, has been remodelling the provincial councils on a more popular basis, and has been extending their powers. It has also imposed restrictions on child labour in factories.

France has been trying an interesting experiment on lines familiar to students of legislation in the United States and in British dominions beyond the seas. A law of 1909 gives power to constitute a *bien de famille* consisting of a house and land occupied and cultivated by a family. This is to be incapable of seizure for debt, but may be alienated under conditions safeguarding the interests of the family. Homestead Exemption Acts are said to have begun in the United States in 1839. In Germany, under the name of *Heimstatt*, has been created a special class of rural estates which cannot be charged with anything but annuities or rents.

Another French law of 1909 is for the protection of child-bearing women. It enables a woman to cease work for two months after child-birth without incurring any liability for breach of contract.

Dr. Schuster's review of German legislation extends over the years 1908 and 1909. A statute of 1908 generalised the law of private insurance contracts and superseded the legislation of the several States on that subject. Another statute of the same year generalises for the Empire the provisions which regulate the formation and constitution of societies for political purposes and the right of public meeting. A third modifies the stringency of the provisions against *lèse-majesté*, provisions under which an incautious word or gesture, and even the omission to rise or to uncover the head, might be punished as an insult to a ruling sovereign, or to a member of his family.

A well-intentioned Act was passed in 1896 for the suppression of gambling on the stock exchange, but produced no useful effect. It was repealed in 1908 and was replaced by provisions which are less severe, and may possibly prove more effective.

On the other hand the statute of 1896 for the prevention of unfair

competition has been extended and made more stringent by a statute of 1909. A person who, for purposes of competition, does any act violating the rules of decent conduct—an elastic expression—may be restrained by injunction and made to pay damages. Particular forms of “unfair competition” are made the subject of special provisions. They include misleading advertisements of “bankrupt stock,” “clearance,” and “season” or “stock-taking” sales. There is also a new clause aimed at “secret commissions.” As Dr. Schuster observes, it remains to be seen whether the new law will be more effective than the old.

Norway has passed a law permitting divorce on grounds much wider than those admissible in England. Specific grounds of divorce are enumerated, and divorce by agreement is permitted, but not until attempts of reconciliation have been made before a special commission of arbitration. Norway has also found it necessary to pass a law regulating the grant of concessions of waterfalls, and of mines and other stationary property.

Mr. Newton Crane's interesting account of legislation in the United States discloses, amid great variety of laws, two main streams of tendency : a strong desire to remove or abate the defects of local, and especially of municipal, government, and a strong desire to improve the conditions of physical health by measures of restriction, supervision, and prevention. To the former motive is due the Massachusetts Act, which arose out of the Commission that for two years investigated the misgovernment of Boston. To the second motive may be ascribed the temperance legislation which has recently made such strides in all parts of the United States, and the numerous tentative measures for the prevention of disease by providing for inspection of food and sanitary appliances, by establishing homes and hospitals for the isolation of tuberculous patients, by the organisation of bureaus of research, and by the administration of preventive measures in all cases of communicable disease. The United States can no longer be described, if they ever were justly described, as the chosen home of rampant and unrestrained individualism.

The legislation of the United Kingdom for 1909 comprised several important Acts, and was characterised by one great omission. Parliament passed a comprehensive Housing and Town Planning Act, amended the Irish Land Purchase Law, established Labour Exchanges and Trade Boards, and altered the mode of taking oaths, but failed to pass its annual Finance Act. The Budget of 1909 was not sanctioned until 1910.

The Indian Councils Act of 1909 was passed in England but related to India. Among the Indian Acts of the same year perhaps the most useful was a new insolvency law for the three Presidency towns and for Rangoon, superseding the Act which was passed in England in 1848, and which was not in conformity with the provisions of modern bankruptcy law.

The legislation for the Straits Settlements reminds us that this dependency now includes the island of Labuan, off the coast of Borneo, and that

a Federal Council, with legislative powers, has been set up for the protected Malay States.

The Commonwealth of Australia has enabled electors to vote by post where personal attendance at the polling booth is made difficult by illness or distance. It has also passed a general Bills of Exchange Act for the whole Commonwealth.

The legislatures of the several States were actively at work during the same year, and passed many laws relating to land, mining, and other topics. Queensland has altered its law as to payment of members, and gives the leader of the Opposition £500 a year instead of the normal salary of £300.

In South Africa the Cape was concerned with labour colonies, Natal with native administration, and the Orange River State with agriculture and irrigation, whilst the Transvaal established a department of labour.

In Sierra Leone human leopards and alligators, and in East Africa witchcraft, were still engaging the attention of the legislatures. East Africa was also protecting big game and regulating the sale of intoxicating liquors.

The legislature of the Falkland Islands was protecting penguins and making education compulsory in Port Stanley.

The Act passed by the Dominion of Canada for regulating immigration deserves careful study. The Dominion legislature also passed a law for the investigation of trade "combines." There was much legislation in the Provinces, especially in Ontario. Newfoundland authorised the admission of women to all branches of the legal profession.

British Guiana has altered the status of carrion crows. Formerly they were protected as scavengers, now they are to be destroyed as disseminators of disease.

FOREIGN.

I. DENMARK.

[Contributed by P. WARNER, ESQ.]

THE principal laws introduced in Denmark in 1909, and having any bearing on foreign comparative legislation, are :

International Arbitration.—Ratification of convention of compulsory arbitration between the United States of America and Denmark, and between Norway and Denmark, by which agreement they are compelled to put any differences arising between the said countries before The Hague Tribunal for settlement, in so far as the difference does not concern the independence or integrity of the respective countries.

Designs.—Law on protection in Denmark of patterns and brands of the Australian Commonwealth, and the British possessions of Trinidad and Tobago, by which law the said countries are put on the same footing as other Powers according to a previous convention.

Chartered Accountants.—A new, and for Denmark important, law was passed in the Law of Authorised (Chartered) Accountants. Previously there were no rules for and practically no supervision of the business of accountants; the new law sets out rules and regulations for passing a special examination and getting a licence. To get the latter the following conditions must be complied with :

(a) The applicant and candidate for a licence of a chartered accountantship must have been employed with an authorised (chartered) accountant for at least three years after having completed his eighteenth year, and during this time the candidate must have actually taken part in the general work of an accountant.

(b) The applicant must then pass a special examination, the examining commission being appointed by the Minister of Commerce. The applicant is to be examined in "knowledge of general commerce" (and in this connection his knowledge of commercial and maritime laws is to be tested) and in "knowledge of accounts." The examination is to be held both verbally and in writing, and it may be augmented by a supplementary examination in "knowledge of goods," also the candidate's knowledge of the valuing of estates with belongings (taxation).

In s. 5 of this law it is stated that if a chartered accountant has by sentence been proved guilty of an act which in public opinion is considered dishonourable then his licence shall be withdrawn. This step is also to be taken when a chartered accountant's business comes under the bankruptcy laws, and his licence is then not to be given him back unless he produces a statement from all his creditors to the effect that he has satisfied them with regard to his liabilities.

Sailors.—A law was passed to safeguard the interests of sailors in the Law of Insuring Sailors.

Weights and Measures.—A law was passed making it compulsory to settle all affairs with the Government departments in accordance with the "Metric System." This means the abolition of the old system of weights and measures and the general introduction of the "Metric System."

2. EGYPT.

[*Contributed by W. E. BRUNYATE, ESQ., C.M.G., Khedivial Councillor.*]

Laws of general public interest—27.

Agriculture.—Law No. 21 prohibits the importation of cotton-seed into the country, as a protection against the introduction of cotton-pests. Law No. 27 is directed against one of the most destructive of the existing pests—the boll-worm. All cotton-stalks and certain other plants on which the boll-worm feeds are to be pulled up or cut down, so as to prevent their sprouting, before December 31. Any plants not so treated, or which are found sprouting before the end of March, may be dealt with by the local authorities at the expense of the landowner. The village authorities are bound to report breaches of the law. At the request of the Legislative Council, all penalties were omitted from the law.

Civil Procedure.—The expert witness of British Courts of Justice finds his counterpart in Egypt in the "expert," who is a quasi-official of the Court and is appointed to report for the guidance of the Court on technical matters arising before it. Law No. 1 attempts to control the experts practising before the Native Tribunals. A Commission is appointed at each Central Tribunal to deal with their admission to the roll, their classification, and their discipline—the punishments being suspension and striking off the roll. The number in each category is to be limited, and, so far as possible, they are to be employed in turn. Power is reserved to employ experts not on the roll for special reasons. There are somewhat elaborate provisions intended to secure reasonable despatch in the conduct of *expertises* and to restrict the power of judges to accord excessive fees: it will be interesting to see how strictly they are applied.

Commercial Law.—Laws Nos. 23 and 24, which modify, in identical

terms, the Native and Mixed Codes of Commerce, arose out of a conflict of judicial opinion as to the validity of gambling transactions in stocks and shares and in futures on the Cairo and Alexandria stock exchanges and the Alexandria produce exchange. The solution adopted is that of State regulation of exchanges, such transactions being declared valid if carried out on an authorised exchange in accordance with its regulations, and invalid in all other cases. General regulations are to be issued by the Government, with the approval of the Mixed Court of Appeal; and one or more Government Commissioners are to be appointed for every authorised exchange, side by side with the Committee of Management, to see to the observance of the regulations.

Criminal Law.—Law No. 15 provides for the placing under a special police supervision of persons “who are recognised by common report as habitually guilty of offences or threats directed against persons or property.” Such persons are to be tried by a Commission composed of the Governor of the Province (Mudir), who presides, the President of the Native Tribunal, the local representative of the Public Prosecutor’s Department, and two notables. Persons found guilty may be sentenced to not more than five years’ police supervision and, in default of finding security for good behaviour, may be ordered to undergo such supervision in a special settlement, which has been established, in fact, in the Oasis of Kharga. The Minister may refer any decision of the Commission for revision by a Committee composed of himself, the President of the Native Court of Appeal, and the Public Prosecutor. A convicted person who has never been convicted of a crime by the ordinary tribunals may appeal to the same Committee against a decision requiring him to find security for good behaviour. The Law contains a provision that when a person accused of murder, attempted murder, or one of a number of other specified offences is acquitted by an Assize Court, in default of sufficient evidence, the Court may, if satisfied that the accused falls within the definition above set out, sentence him to police supervision as above defined.

Law No. 16 extends the power of imposing restrictions upon the residence of persons sentenced to ordinary police supervision, and provides for their being required to give security for good behaviour in certain events in manner above described. Law No. 17 repeals and re-enacts the law as to vagabonds, omitting therefrom the provisions as to suspected persons.

Factory Legislation.—Law No. 14 regulates the employment of child-labour in cotton-ginning factories, the work in which is of a seasonal character and is not infrequently carried on continuously during the busy season both day and night. The employment of children under nine years of age is prohibited, and no child under thirteen years of age is to be employed unless provided with an official certificate that he is physically fit for work. No child is to be employed at night (from 7 p.m. to 5 a.m.), or for more than eight hours a day, or to spend more than twelve

hours a day in or about the factory. Children are also excluded from rooms in which processes are carried on which give rise to excessive fluff. When children are employed in shifts, full details have to be reported to the authorities and a notice of the shifts has to be placarded in the factory. The Minister of the Interior is empowered to extend the application of the Law to other industries. The practical effect of the Law has been the discontinuance of the employment of children under thirteen.

Finance.—Law No. 26 is the annual Budget.

Irrigation.—Law No. 20 modifies in a minor respect the penalties for offences connected with irrigation works.

Judicature.—Law No. 11 transfers the judicial powers of the Governor of El Arish to a summary judge to be delegated for the purpose. (A summary tribunal of the ordinary type was instituted at El Arish early in 1910, and the Law was repealed.)

Local Government.¹—Law No. 22, the most important Law of the year remodels the provisions of the Organic Law of 1883 with respect to Provincial Councils.

Under the Organic Law, the Councils have consisted of members few in number (varying from three to eight), possessing a high property qualification, and elected upon a general list for the Mudiria by electoral delegates chosen, one for each town or village, by universal manhood suffrage. They would appear to have been intended to act as advisory bodies to the Mudir; but owing to various reasons—of which the principal one was the fact that they met only when summoned by decree—their influence has been practically *nil*.

As regards composition, the new Law provides for the election of two representatives from each Markaz (sub-division of a Province) by the village delegates of the Markaz. The number of members is, in all cases, considerably increased, ranging from six to twenty. The high property qualification (payment of land or house tax of £E50 a year) is retained, as serving ultimately as the qualification for election to the Legislative Council; but, as a premium on education, it is reduced to £E25 in the case of persons holding higher education certificates. It is provided, on the suggestion of the Legislative Council, that candidates must be resident in the Markaz itself and must possess the necessary qualification in the Markaz.

The Mudir remains *ex-officio* President of the Council: there are no other *ex-officio* members, but provision is made for the attendance of public servants at meetings of the Council and its committees at which matters connected with their Departments are discussed.

The period for which members are elected remains that of six years; one representative of each Markaz retires by rotation every third year.

The times of meeting of the Councils are left to be governed by their

¹ Portions of this summary are taken from the Annual Report of H.B.M.'s Agent and Consul-General.

standing orders. The President has also a general power to summon meetings, and is bound to do so upon the requisition of one-third of the members.

As regards specific powers, the consent of the Council is required to by-laws made by the Mudir and to the application within the Province of by-laws made by Ministers. Public markets are to be authorised by it; it is to fix the number of village watchmen (gaffirs) in each village (subject to the approval of the Ministry of the Interior) and to determine their pay; and it takes over the powers of the Minister of the Interior as to the authorisation and suppression of outlying hamlets (ezbas). Finally, the Councils are created local authorities in connection with elementary vernacular education and trade schools, a matter which has aroused considerable interest in recent years, and for which considerable endowments have been provided by local notables. Subject to the general control of the Ministry of Education, the Councils can establish or take over schools, and can encourage existing schools which submit to their regulations by grants in aid. Power is given to appoint managing committees for schools or groups of schools; and not more than four persons can be co-opted as additional members of the Council for educational purposes. At the request of the Legislative Council, it is provided that of all sums raised for educational purposes 70 per cent. shall be devoted to education of the type above described and 30 per cent. to more advanced education.

The financial powers of the Councils are somewhat obscure. The provision of the Law of 1883 that the Councils may vote contributions for purposes of public utility within the Mudiria, subject to the approval of the Government, is reproduced; and it is further provided that up to an amount equal to 5 per cent. of the local assessment of the Province to land-tax that approval shall not be withheld; but the possible subject-matters for taxation do not appear to be defined.

In addition to the specific powers above detailed, the Councils are given a general power to make representations as to the general needs of the Province.

Finally, they may be consulted generally by Ministers or by the Mudir, and must be consulted as to a large number of specific matters, such as changes of administrative or judicial districts, the modification of village boundaries, the creation of local commissions for towns within the Province, the annual irrigation programmes of new works, clearances, and rotations, etc.

Savings are inserted in respect of all matters finally dealt with by local commissions within the Province.

Considerable amendments were introduced into the Law as the result of recommendations by the Legislative Council: whether the effect of some of them was fully realised is open to doubt.

Mehkemehs.—Law No. 4 promulgates a new tariff for the Muhammadan religious Courts. The extreme formalism of those Courts sufficiently appears from the fact that, although considerable simplification has been effected,

the fees for documents issued by or registered with the Cadi, other than judgments in contested cases, are dealt with under 120 heads.

Law No. 25 is a first instalment of the reorganisation (completed in 1910) of the same Courts on lines more or less similar to those of the Native Tribunals, with a Supreme Mehkemeh (corresponding to the Court of Appeal) in Cairo, eight Central Mehkemehs taking important cases in first instance and less important cases in appeal, and a single Cadi, delegated from the Central Tribunal, sitting in each District Mehkemeh. The competence of the District Mehkemehs is somewhat enlarged, but the details are unintelligible without a knowledge of the technical terms of Muhammadan law. The tendency has hitherto been for Cadis to regard themselves as holding their respective posts by individual delegation from the Sovereign, in his religious capacity; the new Law, which provides that a general delegation shall be implied by the fact of their appointment, treats them, rather, as members of an organised judicial service of the familiar continental type.

Police.—Law No. 19 authorises the engagement of village watchmen (gaffirs) on contracts for a period of years, and provides that men so engaged shall be subject to military discipline.

Prisons.—Law No. 7 authorises the transfer from convict prisons to ordinary prisons of convicts who are unfit for convict labour.

Public Service.—Law No. 5 is a new Pension Law for members of the civil service. The principal changes introduced are that the maximum pension is increased from £600 to £800; that daughters' pensions continue until death or marriage; that a widow no longer loses her pension when her children attain a prescribed age or marry; and that menial and other non-pensionable Government servants who are retired for ill-health or old age are granted a gratuity at the rate of half a month's pay for each year of service, with a maximum of one year's pay. To the grounds giving rise to pension or gratuity is added "retirement by special decision of the Council of Ministers," which would appear to be intended to legalise a power already exercised by the Council but for which there exists no legislative authority. The old Law provided that questions of interpretation might be referred to the Council of Ministers for its decision; it is now expressly laid down that such decision shall have the force of law.

Law No. 6 repeals the provisions under which the value of the primary and secondary certificates of the Ministry of Education as qualifications for admission to the public service was limited in point of time. Law No. 9, which is, perhaps, the first legislative recognition of "the failed B.A.," differentiates between the simple holder of the primary certificate and the unsuccessful candidate for the secondary certificate who has acquitted himself with a carefully prescribed degree of credit.

Two Laws (Nos. 8 and 13) were found necessary to provide for the replacing of the Advocate-General on Councils of Discipline, that office having been abolished.

Law No. 10, which places the appointment of the subordinate staff of the Native Tribunals and the Department of the Public Prosecutor in the hands of the Ministry of Justice, is the natural complement of the gradual transformation of the Central Tribunals, which the Law of 1883 treated as largely independent of each other, into a uniform judicial service.

Representation of the People.—Law No. 3 provides for the admission of the public to the sittings of the Legislative Council and of the General Assembly. Law No. 18 provides that the Legislative Council shall sit from November 15 in each year to the end of May in the following year, and at other times if specially summoned. No session is to be closed until the Council has reported on all matters referred to it by the Government for opinion. Hitherto the Council has met in alternate months throughout the year.

Taxation.—Law No. 2, passed in connection with the scheme for the sewerage of Cairo, increases the house-tax in that city from one-twelfth to one-tenth of annual rental value. Power is taken, subject to the consent of the Powers, to effect the like increase in any other town which may be sewered. Law No. 12 extends the boundaries of the city of Cairo for the purposes of house-tax.

3. FRANCE.

[Contributed by M. RENÉ A. FAUX, *Avocat, Paris.*]

Workmen's Compensation.—Law of May 29-30, 1909, modifying the quantum of the taxes to be contributed to the security fund ("fonds de garantie") referred to in Art. 25 of the Law of April 9, 1898, and in Art. 4 of the Law of April 12, 1906, concerning Workmen's Compensation.

In accordance with this Law, a decree issued annually, on the proposal of the Board of Trade and the Treasury Board, will determine, for the following year, the quantum of the taxes which have to be paid by the employers, as per Art. 25 of the Law of April 9, 1898, and Art. 4 of the Law of April 12, 1906.

This proportion within the limits of the maximum referred to by Art. 25 of the above-mentioned Law of 1898 will be based on the one hand on the expenses of every kind incurred by the security fund in the course of the foregoing year and, on the other hand, on the total output of the taxes collected during the same year. This combination has the merit of taxing as precisely as possible the present generation for the part which falls to its share.

Crédit Maritime (Maritime Credit).—Law of June 18-20, 1909. The main object of this Law is to remedy the insufficiency of previous legislation (Law of April 23, 1906), and to complete the organisation of "Crédit Maritime." It is inspired by the dispositions regulating the Crédit Agricole (Agricultural

Credit). It creates local branches of Maritime Credit, which will discount drafts drawn by members of the corporations and endorsed by those corporations so as to have the three signatures required by banking institutions, and it authorises these counters to make advances repayable within ten years' time to local companies. These branches have for object to facilitate to members of local corporations the operations which refer to the exercise of their business. In fact, they are the intermediates between the State and these corporations.

The usefulness of the advances made by these branches is unquestionable, permitting as they do the renewal or transformation of working material, etc., to bring it up to the level of the previous year's improvements.

Constitution of a "Bien de famille insaisissable" (or family property whereon it is impossible to levy distraint).—Law of July 12-13, 1909. This Law has for object to create and organise under the name of "bien de famille" an unseizable real estate, consisting of a house, or a house and lands, occupied and cultivated by a family (Arts. 1 and 2).¹ The value of this estate must not in the first instance exceed 8,000 francs, or about £320 (Art. 2), but any increase in its value will not be a cause of forfeiture of the advantages resulting from its own peculiar nature (Art. 4).

The "Bien de famille" can be established only upon a joint tenancy, free of any charges or mortgages. However, mortgages by right of law are not an impediment to its constitution, and retain their effect (Art. 5).

The rights of the creditors of the party creating this "bien de famille" are preserved; the deed of constitution being published by being posted, for three months, at the Tribunal of Justice of Peace (similar to English County Court), or at the town hall of the place where the estate is located, and by two insertions, at a fortnight's interval, in a paper of the district authorised to publish legal notices. During these three months, the creditors are entitled either to enter their claims which are inscribed on proper registers for that purpose, or to form an opposition to the constitution of the "bien de famille" (Art. 7).

The persons capable of constituting a "bien de famille" are: during coverture

- (a) The husband on his own property, on those of the "communauté" (joint property of the marriage) or on such of his wife's property the administration whereof is vested in him;
- (b) The survivor of the marriage, or the divorced one, should there be any child who shall not have attained his majority;
- (c) The grandfather and grandmother who have taken charge of their orphan grandchildren; the father or the mother of a natural child that they have legally acknowledged, provided they have no

¹ This "bien de famille" may also be constituted in favour of foreigners, subject to the regulations of Art. 13, Civil Code.

legitimate issue, or of a legally adopted child; in a word, any person in favour of another, provided that this latter be capable to constitute a "bien de famille."

Art. 6, par. 1, provides that the constitution shall be made by way of a notarial deed or by will, or by deed of gift.

Art. 10 declares the property unseizable, as well as its produce, even in case of failure or bankruptcy, except by creditors who have entered their claims according to the regulations of Art. 7. It cannot be mortgaged or sold with right of redemption.

However, its produce may be attached or distrained upon, for the payment of:

- (a) Debts arising from condemnations by a criminal, correctional, or police court;
- (b) The taxes and premiums of fire insurance concerning the property;
- (c) Debts for alimony.

This unseizability characterises the "bien de famille." The owner thereof cannot renounce or abandon the privilege under any circumstances.

After a long discussion, it has been decided that the "bien de famille" can be alienated. It seemed strange at first sight to make this property unseizable on one hand, and on the other, to make it possible that it might be alienated, because people who will not be able to find money, as they will not be allowed to borrow on their estate, will undoubtedly sell it, and then their family will not enjoy the protection of the law. But above this, there is a more important principle, which is the following:

Inalienability is contrary to the principle of the free circulation of property, which is a question of public order. For this reason the "bien de famille" can be alienated, but subject to certain conditions established with the view of safeguarding the interests of the family. For instance, if the owner is married, or if he has children who have not attained their majority, the alienation is subject, in the first case, to the consent of the wife given in presence of the Justice of the Peace, and in the other case to the authorisation of the family council ("conseil de famille"), who will not grant it unless it is to the advantage of the children.

Art. 12 to Art. 15 secure the preservation and substitution of the "bien de famille" in case of legal expropriation for public improvements, of voluntary substitution of one estate for another or of total or partial destruction.

Arts. 17, 18, and 19 are among the most important of the law, because they regulate the utmost duration of the "régime de faveur" (system of favour) instituted by this Law, and they also regulate the destiny of the "bien de famille" in the three hypotheses which may arise at the time of the dissolution of the marriage.

Art. 17.—The survivor of the marriage is owner of the "bien de famille." In this case the unseizability continues to exist in favour of the said survivor,

whether there be any children or not. This article does not provide the contingency of a divorce. In the absence of any formal regulation we think the following system ought to be adopted: (a) if the divorced person has no children, Art. 17 does not apply; (b) if there are infant children, the unseizability subsists in virtue of Art. 304, Code Civil.

Art. 18.—The survivor of the marriage is not owner of the “bien de famille.” If there are infant children at the time of the death of the parent proprietor of all or of any portion of the “bien,” the Justice of the Peace may, either at the request of the surviving parent, of the legal guardian of an infant, of a child who has attained its majority, or at the request of the family council, prescribe the prorogation of the joint possession until the majority of the youngest.

Art. 19.—The survivor of the marriage is co-proprietor of the “bien de famille.” The law grants him a right of pre-emption on the property. He may claim the possession thereof by paying the price after valuation.

I have thought it advisable to give a rather detailed report of this Law, perhaps a little too long for a mere review of the laws of the year, because it has a very important social character. It is destined to attach the family to its home and to prevent it from becoming divided. It appears to be the best possible measure of protection in favour of small properties. It binds the family to its real property; the solidity of the one depends upon the solidity of the other.

The idea of constituting a “bien de famille” originated in the United States, where the homestead exemption has been in force since 1839. In Europe nearly every State is in favour of the small family property. In England there is the law of 1887, which had for its object to multiply allotments, and the law of 1892, which authorises the creation and guarantees the conservation of small agricultural estates sufficient to keep busy and to supply a family. In Germany has been created a special category of rural estates which the proprietors cannot charge or encumber with anything but annuities or rents. Everywhere the same movement appears; Governments modify their legislation as to land with the object of making small property accessible to the working classes.

Appeal for Misdemeanour.—Law of July 13-14, 1909, modifying Art. 206 (Code Instr. Crim.).

Art. 206, Code Instr. Crim. is modified as follows:

Notwithstanding appeal, the accused who is acquitted or condemned either to prison with “sursis,”¹ or to a fine, will be set at liberty directly after the judgment. So will an accused condemned to prison, when the duration of his term of imprisonment has expired before the expiration of the time allowed to the Procureur-Général (somewhat similar to the Public Prosecutor) to enter an appeal.

¹ A formal condemnation not enforced; something similar to English “binding over to come up for judgment.”

This modification is due to the anomaly that existed with regard to prisoners sentenced with "sursis." Before the Law of March 26, 1891, Art. 206 read as follows: "In case of acquittal, the accused will be immediately set at liberty, notwithstanding appeal"; but this could only apply in the case of an acquittal. Thus the prisoners sentenced with "sursis" found themselves in this situation, that when they had been arrested, they could not be set at liberty before the expiration of the delay for appeal, *i.e.* ten days, or even two months, if one considers the special delay particular to the Public Prosecutor, as per Art. 209, Code Instr. Crim. So that, for instance, a person condemned to two days' imprisonment with "sursis" would have been kept in gaol during two months from the date of the judgment.

This new Law is destined to put an end to this state of things.

Extradition.—Law of July 14-16, 1909.

This Law is a formal approval of the Additional Convention on Extradition between Great Britain and France, signed in Paris, October 17, 1908.

To fully appreciate the object of this Law, it is necessary to give a short history of this important question.

By Art. 2 of the Extradition Treaty between Great Britain and France, August 14, 1876, neither of the contracting Powers could entertain a demand for extradition concerning her own subjects. This clause, which is the basis of French Law on Extradition, does not prevent the tribunals from punishing crimes or offences committed in foreign territory. The French jurisdiction is competent to try and pronounce judgments in such cases. But English legislation has no similar dispositions; its character is substantially territorial; it does not provide for a British subject being taken before a Court of the United Kingdom for infractions committed by him in another country. If, on the other hand, a Treaty of Extradition does not authorise the handing over of such an offender, the man escapes any effective punishment.

In 1878, the British Government appointed a Commission to study these questions of extradition, and, as a result, Conventions were passed between Great Britain and Spain, Russia, and Austria, enabling the former to hand over her own subjects without, however, giving her any right to obtain reciprocity from the High Contracting Parties. On October 17, 1908, an additional Convention was signed in Paris, modifying Art. 2 of the Treaty of August 14, 1876, stipulating that each of the High Contracting Parties will be at liberty to refuse to the other the extradition of her own subjects. This new Convention does not change anything on the French side, but it enables the British Government to secure, by the extradition of its own subjects, the punishment which it cannot carry out itself.

Apropos of the question of extradition, a very interesting point may be raised:

Art. 9 of the Treaty of March 7, 1815, concluded between France and England, has an important exception to the principle that France does not hand over her subjects for crimes or offences committed in a foreign country.

In fact, according to Article 9, in India the French authorities are bound to surrender, on a mere demand of the British Government, all individuals, including French subjects, wanted for infractions committed on British territory, and who have sought a refuge in French possessions. Several times the French Government has been approached, and even requested, by several members of the two Houses of Parliament to have this exception abolished. The last attempt of this kind was refused by M. Pichon, the present Minister of Foreign Affairs. So things stand in the same position, and yet it is a very strange situation. Although it did not quite come under the *exposé* of this Law, it seemed to me it would be interesting to recall this little anomaly.

Divorce; Separation.—Law of July 14-16, 1909, by virtue of which Art. 247 of the Civil Code will in future rule the procedure of separation.

Art. 1.—The following provision is introduced in the Civil Code, where it will replace the former Art. 308, abrogated by the Law of July 27, 1884 :

“Art. 308.—Art. 247 of the Civil Code is applicable to the procedure of judicial separation.”

In the matter of judicial separation as well as in the matter of divorce judgments or orders by default may be “opposed.” But Art. 247 of the Civil Code makes, with regard to this part of divorce proceedings, some regulations that are peculiar to these proceedings, and that vary according to whether the judgment or order has been served on the respondent or not. If it has been, the respondent is entitled to one month for entering his opposition ; if it has not been, the judgment or order must be published in the papers, and the opposition can be entered within eight months from the date of last publication. When this delay has expired, the judgment or order becomes final.

It is not the same for judicial separation, which is regulated by common law principles (Art. 198, C. Pr. C.), *i.e.* that an opposition can be entered against a judgment so long as this latter has not been enforced. But, supposing the husband when respondent has entirely disappeared, and there is not the slightest chance of tracing his whereabouts, how can this judgment be enforced? The result is that, as the judgment cannot be enforced, it may be opposed for ever. This used to put the wife in a very difficult situation, as she could not be looked at as definitely separated.

Fortunately this Law remedies this state of things.

Marriages Celebrated in France and in Mexico.—Law of July 16-18, 1909, which ratifies the Convention passed at Mexico on June 3, 1908, between France and Mexico, to guarantee the validity of the marriages of people under their respective jurisdiction, celebrated in the presence of Diplomatic and Consular Agents.

French Consuls in Ethiopia.—Law of November 16-18, 1909.

This Law confers the jurisdictional competence and the judicial powers provided for in the Edict of June 1778, upon French Consuls in Ethiopia.

Contract for Service.—Law of November 27-28, 1909.

This Law was passed for the benefit of women in employment at the time of maternity, and it provides that they shall be entitled to cease work for two months in order to enjoy the repose required by their condition, without the risk of losing their employment.

Up to the passing of this Act, French law protected the child, but the woman in her quality of mother was entirely overlooked. And, after all, can there be anything more necessary than legal protection for a woman at the time of her maternity?

In nearly all European countries, laws have been passed providing for this repose. Bulgaria, France, Russia, and Sweden were the only exceptions, and now France is free from this reproach.

Henceforth the woman worker, knowing that she is protected by the law of her country, will dare to take the rest to which she is entitled. On the other hand, her employer will, at last, consider himself bound to encourage her to take it by this legal recognition of its necessity.

I cannot do better than quote the single article which forms this Law:

“Art. 1.—The stopping of work by a woman during eight consecutive weeks, within the period which precedes and follows her delivery, shall not be a cause for breach of contract by the employer, and that, subject to damages, in favour of the woman. The latter must notify the employer of the reason of her absence.”

Any convention contrary to the provisions of Art. 1 is null and void, *ipso facto*.

The woman shall be entitled to “assistance judiciaire” (right to sue *in forma pauperis*) in Courts of the First Degree.

4. GERMANY.

[Contributed by ERNEST J. SCHUSTER, ESQ., LL.D.]

General Observations.—The labours of the German Imperial Legislature during the years 1908 and 1909, and during the present year, have in part been devoted to the statutes to which detailed reference is made below, but much time has also been given to the preparation of new enactments on other matters. The draft of the “Reichversicherungsordnung,” by which the whole law of compulsory insurance against sickness, accidents, and invalidity will be consolidated and re-modelled—a giant Bill containing 1,754 sections—has for some time been before the Federal Council, and has, since the spring of the present year, occupied the Reichstag; the draft of a new Code of Criminal Procedure is also under consideration. The preparations for the new Penal Code have not as yet been completed, but they are progressing.

If the Uniform Bills of Exchange Law, which has formed the subject of a Conference at The Hague, is finally settled at the adjourned meeting in September 1911, it will form another important addition to the German Imperial Statute Book.

The law as to cheques, passed in 1908, is not referred to below, as it has been fully dealt with in a former number of this Journal (No. XIX, pp. 79-83).

1908.

Statute relating to Insurance Contracts.—The German law of insurance is dealt with in a number of statutes. The statute as to private insurance of 1901 regulates the precautions required to be taken for the safety of the policy-holders on the establishment of insurance companies, and provides for the appointment of a Government Board by which they are controlled. The laws as to compulsory insurance against sickness, accidents, and invalidity (which, as mentioned above, will shortly be consolidated and amended) are at present embodied in a large number of complicated enactments. The law as to marine insurance is contained in ss. 778-900 of the Commercial Code; the Civil Code deals with life insurance for the benefit of a third party (s. 330), and contains certain rules as to contracts providing for annuities (ss. 759-61). In addition to this there existed, prior to the coming into force of the above-mentioned Act, a variegated State law on the same subject, which was expressly upheld by Art. 75 of the statute introducing the Civil Code.

The new enactment does not interfere with the previously existing Imperial law, but (subject to specified exceptions enumerated in ss. 191-3, and subject also to the exception in respect of Bavaria referred to below) it revokes the existing State law. In so far as it gives a statutory construction to the conditions usually set out on insurance policies, it does not in fact contain new law, but maintains the law previously established by judicial decisions.

From the point of view of the student of the methods of federal legislation the provisions contained in Art. 2 of the statute introducing the new Insurance Law are of interest. Under these provisions the rules relating to the insurance of immovables are not applicable to Bavaria unless they receive the special sanction of the Bavarian Government. This concession to local autonomy shows that the subdivision of the German Empire into separate States is of much greater significance than is generally assumed.

The first subdivision of the first part of the new enactment contains general rules dealing with the form of insurance contracts and the effect of provisions as to forfeiture, prescription, and other matters; the second subdivision deals with the duty of the insured to make full disclosure,

and the right of the insurer to give notice to determine the contract in the event of an unexpected increase of the risk; the third subdivision regulates the payment of premiums; and the fourth the rights and powers of insurance agents. The second part of the statute deals with insurance against damage (fire insurance, insurance against hail, insurance of cattle, insurance of property carried on land, and liability insurance). The third and fourth parts respectively contain the special rules relating to life insurance and insurance against accidents.

The statute in several places limits the freedom of contract; thus, for instance, a condition stipulating that an insurance claim is not to be due before its amount has been established either by express acknowledgment or by compromise, or by the final judgment of a competent Court, is not binding on the insured (s. 11, see also s. 65, as to a condition limiting the right of the insured to be represented at an inquiry as to the nature and extent of the damage; s. 172, as to a condition altering the legal rules as to forfeiture in the case of life insurance, etc.). It is, however, provided that these rules are not to apply in the case of insurance of goods against the risk of carriage by land, or in the case of insurance of solvency, insurance against losses on investments, or insurance against unemployment (s. 187; see also s. 188).

A separate statute provides for the amendment of the part of the Commercial Code dealing with marine insurance, so as to bring the provisions on that subject into harmony with the rules relating to other branches of insurance.

Statute regulating the Right of Association and Public Meeting.—The rules relating to incorporated associations contained in ss. 21-79 of the German Civil Code are rules of private law; the restrictions as to the formation of associations and the control exercised over them on grounds of a public nature were, prior to the coming into force of the above-mentioned statute, regulated by State law. The new enactment recognises the principle that all German subjects are entitled to form associations for purposes which are not opposed to the rules of criminal law, but societies formed for political purposes must conform to certain rules as to their constitution and as to the conditions of membership. The rule formerly contained in s. 72 of the German Civil Code, under which every registered society had to supply a full list of members when called upon to do so by the competent Court, is repealed by the new law, under which it is sufficient to state the number of members (see s. 22).

The right of public meeting is safeguarded in a similar way as the right of association, but every meeting must either be publicly announced or notified to the competent police authority, unless it belongs to one of the specified kinds of meetings which are exempt from this rule; open-air meetings and processions through public streets require special permission. In all cases one or two representatives of the police authority may be present

at the meeting for the purpose of ascertaining whether the prescribed rules of order are duly observed; in the event of non-compliance with the rules the meeting may be dissolved.

As a general rule no language except the German language may be used at any public meeting, but an exception is made in favour of international congresses and meetings held in connection with parliamentary elections. Further exceptions may be authorised by State law, and there is also a special provision relating to districts in which more than 60 per cent. of the population are accustomed to use a foreign language. The last-mentioned exemption, which has special reference to Alsace-Lorraine, will expire on May 15, 1928.

Statute amending the Bourse Law (Law as to time bargains in stocks and produce).—The Bourse law of 1896 is a good instance of legislation introduced with a laudable object but defeating its purpose by reason of the fact that its authors were not sufficiently acquainted with the matters with which they attempted to deal, or with the character of the classes of persons which were affected by the new provisions. The principal object of the Act was to prevent persons other than professional speculators from embarking on time bargains in stocks and produce on the public exchanges. Public registers were therefore introduced in which persons regularly engaged in stock exchange or produce exchange business were expected to enter their names, and it was enacted that no time bargain in stocks or produce on any public exchange should be valid unless both parties thereto were persons entered on the exchange register; on the other hand a time bargain between parties entered on the register was to be binding, even if it had the characteristics of a wagering transaction. Time bargains on the public exchanges in shares, in mines and industrial companies, and in corn and milling products, were prohibited altogether. It was thought that in view of these provisions no one would thenceforth speculate on the exchanges, unless both he and the other party were entered upon the register and that speculation on the public exchanges in the shares and products to which the prohibition referred would cease entirely. The Act, however, had an entirely different effect; very few people had themselves entered upon the register, and no respectable person took advantage of the plea of non-registration. Moreover, a large part of the speculative business was transferred to foreign countries.

The persistent agitation for an amendment of the law did not bear fruit before 1908, when the above-mentioned amending Act was passed. The new Act abolishes the speculators' register, but in order to confine speculation to the proper channels it substitutes registration in the ordinary mercantile register for registration on a special register, and this in effect renders the bargains in question valid if both parties thereto are mercantile traders doing business on a fairly large scale. Bargains not satisfying the condition as to registration are not entirely inoperative, but are given effect to within certain limits. Time bargains in corn, milling products, and mining and

industrial shares may now be permitted by the Federal Council on such exchanges and in such manner as the Federal Council may direct, and several orders giving such permission have already been issued.

The original as well as the amended Bourse law also deals with a number of other matters which are not of sufficient importance to be referred to in this place.

Statute for the Simplification of Protests on the Dishonour of Bills of Exchange.—This statute considerably simplifies the formalities which a person presenting a bill of exchange for acceptance or payment has to go through in the event of the bill being dishonoured, but it does not go far enough. It is to be hoped that the changes in bills of exchange law which will be brought about as a result of The Hague Conference will include a modification of the cumbrous and expensive protests which are still in use in Great Britain and other countries.

Statute modifying the Liability of Persons keeping Animals.—By virtue of s. 833 of the German Civil Code a person keeping an animal was liable for all damage caused by such animal; the above-mentioned statute modifies this rule by providing that a person keeping a domesticated animal for purposes of his profession or trade or of his maintenance is not liable for any damage caused by such animal if in keeping watch over it he has used reasonable diligence, or if the damage could not have been avoided by the use of reasonable diligence.

Statutes modifying the Law as to Lèse-Majesté.—Under ss. 95, 97, 99, 101 of the German Criminal Code insults directed against the Emperor or the sovereign or regent of any German State or a member of any reigning family are punishable as therein mentioned. The result of these provisions was that incautious utterances or gestures or even mere acts of omission (*e.g.* remaining seated or remaining covered on occasions when the accused ought to have risen or removed his head-covering) were often reported to the authorities out of motives of hatred or revenge, and led to prosecutions and convictions. The new statute provides that an act coming under the above-mentioned provisions is not to be punished, unless it was committed wilfully and deliberately and with the intention of insulting the person against whom it was directed.

1909.

Statute for the Prevention of Unfair Competition.—This statute replaces the one dealing with the same subject passed in 1896 (see my *Principles of German Civil Law*, pp. 342, 343). The new law extends the provisions against unfair competition to a considerable extent. For the first time a general clause is introduced under which a person who for purposes of competition does any act violating the rules of decent conduct (*gegen die guten Sitten verstossend*) may be restrained by injunction on the application of any competitor, and may also be ordered to pay damages.

The provisions against specific acts of unfair competition are wider and of a more stringent nature than under the former law. As under the former law, untrue allegations made in public announcements creating the impression of a specially favourable offer, untrue allegations concerning a competitor or any of his employees likely to injure his trade or credit, as well as the misleading use of a competitor's firm name or business designation, can be made the subject of civil or of criminal proceedings. Under the new provisions a person is also liable to be punished by fine or imprisonment (*a*) if he advertises as "bankrupt stock" goods which, having originally belonged to a bankrupt, have ceased to form part of a bankrupt's estate; (*b*) if he advertises a "clearance sale" (not being one of the recurring "season" or "stocktaking" sales) without indicating the true reason of such sale; (*c*) if he includes in a "clearance sale" goods bought specially for the purpose of being so included; (*d*) if he holds a "season" or "stocktaking" sale otherwise than in accordance with the regulations (if any) issued as to such sales by the competent Government authority.

The "secret commission" mischief is dealt with by a new clause which enacts that any person who, for purposes of competition, hands over, offers, or promises to any employee or agent any gift or other advantage with a view of inducing preferential treatment as to orders or purchases by unfair means, is punishable by one year's imprisonment and by a fine.

It remains to be seen whether the new law will be more effectual in stopping unfair competition than the law which it replaces.

Statute amending the Organisation and Procedure of the German Courts.—The principal change effected by this statute is the extension of the jurisdiction of the Local Courts (*Amtesgerichte*). These Courts—apart from the jurisdiction conferred upon them as to certain specified matters—are the proper tribunals in all actions relating to pecuniary claims not exceeding a certain maximum amount. This amount, which under the former law was 300 marks, has been raised to 600 marks. The innovation—to a certain extent—relieves the Provincial Courts (*Landgerichte*), which are the Courts to which all matters not subject to the jurisdiction of the Local Courts must go in the first instance. Both the Local Courts and the Provincial Courts are spread all over Germany, so that even in cases where the Provincial Court is the Court of first instance the suitors have not to travel a long distance. There are 1,944 Local and 176 Provincial Courts in the German Empire.

Statute as to the Regulation of Motor-car Traffic.—This is the first German Imperial Statute dealing with this matter. Both cars and drivers require licences; the granting of the latter is made dependent on the passing of an examination.

A person keeping a motor-car is liable for all damage caused by such car to any human being or to any object or property, unless he can prove that the accident was due to an unavoidable event not connected with an

inherent fault of the vehicle. An event caused by the damaged person or by a third party (not being the driver of the car) or by an animal is deemed unavoidable if the keeper, as well as the driver of the car, have not been wanting in the diligence required under the circumstances of the case.

No speed limit is laid down by the Statute, but fines are imposed in the event of non-compliance with the local police regulations. Special punishments are prescribed in the case of a person attempting to avoid identification after an accident by immediate flight. Where an injured person is wilfully left in a helpless condition a sentence of six months' imprisonment may be awarded.

5. NORWAY.

[*Contributed by P. WARNER, ESQ., of Christiania.*]

Divorce.—When husband and wife agree to be divorced from one another the officials concerned will grant them the divorce they have asked for; but before granting them this, a special "Commission of Arbitration" (Forlikskommission) is to endeavour to reconcile the parties and try to settle the differences arising between them (s. 1).

The King may, on being requested by husband or wife, grant the divorce when the one party continually or frequently neglects the duties of support, or otherwise is guilty of serious or continuous offences against the duties of married life, or is addicted to drink or other intoxicants, or leads a disreputable life, or has several times been sentenced to punishment and consequent loss of civil rights; also when such a difference has arisen between husband and wife that, with due regard to both of them and to the welfare of their children, it is not advisable that the husband and wife shall continue to live together (s. 2).

A divorce is to be granted when either husband or wife at the time of getting married, without the other's knowledge, either:

- (a) had a fault about his or her body which made him or her unfit for married life, or
- (b) suffered from epilepsy or leprosy, or venereal disease of an infectious kind, or
- (c) suffered from or had been suffering from lunacy, or
- (d) if the wife had been got into the family way by some one else than the husband.

The claim for a divorce must be put in within six months after the one party has got to know about it, and at any rate within five years after they were married.

Dissolution of marriage having reference to (a) and (b) cannot be allowed after the above faults have been made good again or the disease cured (s. 3).

Divorce is also granted when one of the parties has been punished under the Criminal Law Acts, or is guilty of having caused bodily harm to the other,

or any other wilful crime and consequent harm to the other, or been guilty of cruelty or other offence to the children. But dissolution of the marriage cannot be demanded by either party if he or she has voluntarily taken part in the offence to the children, or has agreed to it.

A demand for divorce must be made within six months after the one party has received knowledge of the criminal offence of the other, and at the latest five years after the offence was committed. If the offence leads to sentence and punishment, the demand may, however, be made later when the other party demands it within three months after he or she has got to know of the sentence, and within one year after the sentence was passed (s. 4).

S. 5 says that a divorce may be granted when a spouse has been frequently sentenced for drunkenness, etc., if the said sentence carries with it the obligation for the offender to go into a penal workhouse or sanatorium for drunkards.

Divorce is granted when a spouse has unlawfully declined for two years, against the other's will, to live with the other (s. 6).

Upon request divorce is granted the one party when the other has been declared by two skilled physicians to be a lunatic and the insanity has lasted at least for three years without the patient being likely to recover from it (s. 7).

Divorce is granted when husband and wife have been separated for two years by virtue of authority given by the Government or by the King, and cohabitation has not been resumed. But the marriage may be dissolved and divorce granted after one year's separation only provided both husband and wife demand it.

Divorce is also granted upon either party's request when the parties have without such authority of separation lived apart for three years and not resumed cohabitation (s. 8).

S. 12 orders that when a marriage is dissolved by virtue of sentence or request, the wife must not marry again till ten months have passed after having lived altogether apart from the husband.

S. 14 contains obligations for the husband to support the wife as long as she does not marry again. But such support is not required when the marriage is dissolved for reasons given under s. 3 upon the husband's request. So if the divorce was granted chiefly on account of the wife's wrongdoings, the husband is not compelled to give anything towards the support of the wife, unless there are special reasons for the husband to support her.

The husband may also be entitled to receive support from the wife, but not if the marriage is dissolved for reasons mentioned under s. 3, or if the husband only is to blame for the rupture.

Criminal Law.—Law of June 5, 1909, contains some alterations in the General Criminal Law of May 1902. While s. 85 previously made it a punishable offence to expose Norway to war or military precautions by reason of wrong conduct towards a foreign country, the section now metes out

punishment to any one who offends against any rules which the King has passed for maintaining the country's neutrality during war between foreign Powers.

S. 95 previously made it a punishable offence to expose to danger the peaceful relations with a foreign Power by publicly defying or agitating to hatred against Norway or the Government of Norway, or against another country or her Government; the same section now makes it a punishable offence to defy the flag or coat-of-arms of a foreign country.

S. 328 provides punishment for any one who unlawfully, publicly, or for a wrong purpose makes use of a password or a term which, by reason of agreement with a foreign Power, is meant to be used only by persons or institutes that are to give assistance to sick and wounded in war.

Apothecaries' Business.—Law of August 4, 1909, contains rules concerning apothecaries (chemists). The sale of medicines and poisons must, as a rule, be effected only by apothecaries licensed by the King. Hence to carry on the business as a chemist a Royal licence is required.

Concessions of Waterfalls, Mines, and other Stationary Property.—*Waterfalls.*—Without permission given by the King, no one else but the Government of Norway, Norwegian municipalities, and Norwegian citizens may become proprietors of or users of waterfalls or streams which may be reckoned, either alone or combined with others, to yield more than 1,000 natural horse-power (s. 1).

Foreign citizens and corporations, etc., and other companies with limited liabilities, whose board of directors is in Norway and a majority of the directors Norwegian citizens, may be given waterfall concessions by the King on certain conditions. Condition No. 10 requires that the concession shall be given for a specified period of at least sixty years or at the utmost eighty years. The period is reckoned from the giving of the concession. When the time of concession expires, the waterfall with all its arrangements through which the water is regulated, such as basins, canals, tunnels, mains, etc., as well as the parcels of land and rights bought for the building up of power stations, etc., is expropriated by the State without indemnity.

This also applies to the machinery and other appliances, which the State may take without paying for them. What the State is not entitled to expropriate can be released for its value by the State on valuation (s. 2).

This drastic system of dealing with concessions also applies to mining properties and other stationary property.

Another important law introduced in 1909 is the law of September 18 on the **Insuring of Sick**. This law may be said to be a step towards the next—Public Insurance.

6. SWEDEN.

[*Contributed by P. WARNER, ESQ., of Christiania.*]

Two important new Laws have been passed by the Swedish Parliament, viz. Law of June 5 concerning the founding and work of Emission Banks (*i.e.* banks founded for the creating of limited companies for development of commercial industries), and Law of November 20 prohibiting women's night work in factories and certain industrial concerns (concerns which employ at least ten hands).

Emission Banks.—The Law on Emission Banks provides that the bank is to be so styled as to clearly indicate that it is an Emission Bank, and that it is at the same time a limited company. The founders of an Emission Bank must number at least four. The working capital or foundation funds shall at least amount to 8,000,000 kroner (equal to £450,000).

No single person may own a greater part of an Emission Bank than the amount that corresponds to one-third of the foundation capital. Of the yearly profit at least 25 per cent. shall be put aside for the forming of reserve funds, and this is to be done every year until the reserve funds reach the same figure as the foundation capital; then they need not transfer any more of the profit to the reserve funds. Should the reserve funds, however, go down under the foundation capital, then the putting aside of profit to the former must again be started.

An Emission Bank must not receive deposits from the public in the form of savings, etc., or the like. And other kind of money must not be deposited in an Emission Bank in lots less than 10,000 kroner at a time (equal to about £550). Further, the amount of money deposited in the bank must not exceed the amount of foundation capital and reserve funds put together.

Women's Night Work in Factories.—The Law of November 20, 1909, on prohibition of women's night work in industrial concerns provides that the women workers must not work between the hours of 10 p.m. and 5 a.m. This applies to factories and industrial concerns that employ ten hands or more. The women employed in such factories, etc., are to be free for eleven hours out of the twenty-four. An exception is made for concerns whose work is confined to a season and has to be forced through in a limited time; the women may get only ten hours free.

(In order to render it easier for employers to make the necessary new arrangements, this law is not to come into force till January 1, 1911.)

Marriage Convention.—Under date of November 27, a convention between Sweden and Denmark has been agreed to, by which the high contracting parties give mutual consent to one of the parties giving the authority to their appointed diplomatic and consular officials in the other party's country to marry people in accordance with the law of the country in whose service

they are, but on the condition that at least one of the two who are to be married is a citizen of the latter country, and that none of them is a citizen of the country within whose territory the wedding takes place.

7. UNITED STATES OF AMERICA—STATE LEGISLATION.

[*Contributed by R. NEWTON CRANE, ESQ., of the Middle Temple.*]

The legislation in 1909 of the States of the United States was, generally speaking, as voluminous and as varied in character as in previous years. A large variety of topics of public interest was discussed and dealt with by resolutions or embodied in statutory enactments. An effort is discernible to improve the character of the electorate, and to centralise the power and authority of executive officers of all municipalities in order to lessen the opportunities for "graft" and other forms of corruption. A number of States adopted Corrupt Practices Acts, and two notable Statutes were enacted providing for the government of cities by commissions, instead of by an elected mayor and legislative council. Laws were passed in certain of the States to elevate the judiciary, and in other ways to prevent the delays of litigation. The most popular topic of legislation, however, was that which relates to the subject of temperance, and of what may properly be described as Eugenics, if this word may be considered to embrace tentative measures for the prevention of disease, not only by providing for inspection of food and sanitary appliances, but by the establishment of homes and hospitals for the isolation of tubercular patients and the organisation of bureaus of research and the administration of preventive measures in all cases of communicable disease.

The Electorate.—In Arizona, in addition to the statutory qualifications of electors as heretofore, there are added the following: "And who not being prevented by physical disability from so doing, is able to read the Constitution of the United States in the English language in such manner as to show he is neither prompted nor reciting from memory, and to write his name."

In Georgia the qualifications of the voters are as follows: "(1) All persons who have honourably served in the land or naval forces of the United States; or (2) all persons lawfully descended from such persons; or (3) all persons who are of good character and understand the duties and obligations of citizens under a Republican form of government; or (4) all persons who can correctly read in the English language any paragraph of the Constitution of the United States or of Georgia, and can correctly write the same in the English language when read to them by any one of the Registrars, and all persons who, solely because of physical disability, are

unable to comply with the above requirements, but who nevertheless can understand or can give a reasonable interpretation of any paragraph of the Constitution of the United States or of Georgia that may be read to them by any of the registrars; or (5) any person who is the owner in good faith in his own right of at least 40 acres of land situated in the State upon which he resides, or is the owner of property situated in the State and assessed for taxation at the value of \$500."

Courts and Procedure.—Montana and North Dakota passed laws providing for the election of a non-partisan judiciary. Washington now requires judges of the Superior and Supreme Courts to wear black silk gowns on the Bench. Tennessee has provided that persons shall not be disqualified as jurors because of opinions which they may have formed based on newspaper reports or other rumours. In Wisconsin a new Act provides that no judgment in a civil or criminal case may be reversed for any misdirection of the jury, improper admission of evidence, or for errors as to any matter of pleading or procedure, unless in the opinion of the Appellate Court it shall appear that the error complained of has affected the substantial rights of the party complaining. Washington has now followed the rule of many Western States that trial judges must reduce their charges to writing and read them to the jury before argument by counsel.

Municipal Government.—An Act was passed by the Legislature of Massachusetts which may have a radical effect upon the government of the city of Boston. This is the result of the report of a Commission which for two years investigated the misgovernment of Boston and recommended a new charter. Its general objects are to enable the citizens to know what is being done, and to fix responsibility. The Act provides that all heads of departments and members of Municipal Boards shall be appointed by the mayor, without confirmation as heretofore by the council. The appointees shall be recognised experts in such work as may devolve upon them, or be persons specially fitted by education, training, or experience to perform the same, and they shall be appointed without regard to party affiliation or to residence. All such appointments by the mayor shall, however, be submitted to a Board of Civil Service Commissioners, whose duties it shall be to make a careful examination of the qualifications of the nominees, and not until the Civil Service Commission shall have ascertained that an appointee is a competent person with the requisite qualifications will the appointment become operative. A Finance Commission of five persons, appointed by the governor of the State, has practically supreme authority with respect to appropriations, loans, expenditures, and accounts affecting the city. The Act making these sweeping changes further provides that the citizens of Boston shall vote upon the question of which one of two plans shall be adopted for further changing the government of the city. Plan 1 provides for an election of the mayor for two years, and for the election of a city council of thirty-six members, one from each ward of the city, and nine to be elected

at large. Plan 2 provides for an election of mayor for a term of four years, and a city council of no more than nine members, all of whom shall be elected at large. No citizen shall have a right to vote for more than five candidates for the council, and the nine candidates receiving the largest number of votes shall be elected. No ballot at any municipal election shall have printed on it any party or political designation, or anything showing how the candidate was nominated or indicating his views or opinions.

The Kansas Legislature passed an Act which provides that all cities within the State of the first class (those having a population of 15,000 or over) may, by a majority vote of all electors voting at a special election called for that purpose, adopt the provisions in the general law for municipal government by commission. The commission shall consist of a mayor and four commissioners, to be elected at large by all the adult voters, including women. These commissioners shall have complete control of the police and fire departments, of finance and revenue, of water-works and street lighting and street improvements, in fact of everything that relates to the city, with power to make and enforce such rules and regulations as they may deem fit, and appoint and remove executive officers.

Gambling.—A number of the States have passed laws to prevent betting and pool-selling upon horse-racing, and some of them have gone even further. In California the new Act provides that any person who engages in pool-selling or book-making, or keeps or occupies a building or place or stand upon any public or private grounds within the State for that purpose, or for the recording or registering of bets or wagers upon the result of any trial or contest of skill, speed, or power of endurance of man or beast, or between man or beast, or upon the result of any lot, chance, casualty, or unknown or consequent event whatsoever, shall be punishable by imprisonment for thirty days without the option of a fine.

Prohibition of Cigarettes and Tobacco.—Four States have enacted legislation with respect to the prohibition of cigarettes and tobacco and their use by minors. Minnesota prohibits their sale. Both Washington and Kansas have enacted legislation of an exceptionally drastic character, which marks the highest point which sumptuary legislation has reached in the United States. The Washington Act makes the selling, giving away, or having in possession a cigarette a crime. In Kansas it is provided that every minor person who shall sell or use cigarettes, cigars, or tobacco in any form, on any public street or lands used for public purposes, or at any public place of business, shall be guilty of a misdemeanour, punishable by a fine of not more than \$10, and every person who shall furnish cigarettes, cigars, or tobacco in any form to a minor, or shall permit such minor to frequent any premises owned by him for the purpose of indulging in cigarettes, cigars, or tobacco in any form, shall be guilty of a misdemeanour, punishable by a fine of not less than \$25 or more than \$100.

Sale of Intoxicating Liquors.—Every State in the United States has now either restricted the sale of intoxicants by prohibition generally or has authorised such prohibition by counties the residents of which have passed local laws favouring what is called "local option." On December 31, 1908, there were five States under complete prohibition law—namely, Maine, Kansas, Nebraska, Georgia, and Oklahoma. On January 1, 1910, there were nine prohibition States, including those mentioned, and Alabama, Mississippi, and North Carolina (in each of which States the new law went into effect on January 1, 1909) and Tennessee, which closed its retail liquor traffic on July 1, 1909, and abolished the manufacture of intoxicants on December 31, 1909. The voters of Florida were to vote on State prohibition in November 1910, and, if carried, the new law will take effect in 1911.

In California there are no less than 300 prohibition towns, in Iowa there are 74 counties which are "dry," to use a popular American expression; Kentucky has 92 prohibition counties, and only four which are wholly "wet." In Massachusetts there are 260 prohibition towns and 18 cities, and the State at large, by a majority of 18,000 votes, refused to grant licences. In the city of Worcester, in Massachusetts, with a population of 150,000, the question was twice submitted to the electors, who voted in favour of prohibition. Nebraska has 600 prohibition towns and 22 prohibition counties. In New Jersey the granting of licences for the sale of intoxicants in cities is by State authority, while the towns are empowered to pass local enactments on the subject. In accordance with this authority 285 towns have voted to be "dry." In Ohio there are no less than 1,621 prohibition towns under the general "local option" law, and 47 counties prohibited the sale of liquors, in any form, within the first sixty days of the law going into effect. These are only illustrations of the favour with which prohibition is received by the voters. There are 375 prohibition cities in the United States of 5,000 population and over; 90 of 10,000 and over; while 53 leading industrial centres, of 120,000 population, in 14 States are included among those communities where the sale of intoxicants in any form is forbidden. The new Legislation in 1909, aside from prohibition, was directed toward the enforcement of existing laws. In Florida and Iowa drinking upon railway trains was made a misdemeanour. The Michigan Act provides that saloons or public-houses may not furnish to any person free of charge any food except biscuits and pretzels. In Nebraska the sale of liquor in public-houses on Sunday, and between 8 p.m. and 7 a.m. on week-days, is prohibited. Iowa forbids the granting of licences for saloons to a greater extent than one for every 1,000 of the population, while Minnesota allows one for every 500 of the population. South Carolina and North Dakota make it a misdemeanour to solicit orders for intoxicants, and to advertise liquor for sale. The most novel legislation on this subject was enacted in South Dakota and New Jersey. In South Dakota an applicant for a licence to sell intoxicants must furnish a bond of \$2,000, upon freehold security,

that he will not sell or give away liquor, or any kind of intoxicants to any minor or any adult person who at the time is intoxicated, or to any person in the habit of getting intoxicated, or to any person when forbidden in writing to do so by the husband, wife, parent, child, guardian, or employer of any such person, or by the mayor or other official of that town or county in which such person shall reside or temporarily remain. In New Jersey the law authorises every municipality to appoint three reputable persons, to be known as a "board of protectors," whose duty it shall be to investigate the cause of drunkenness in their municipality, and whenever they are satisfied that any person therein is an habitual drunkard they shall, by notice in writing to every house, forbid the serving of drink to such person.

Eugenics and Health Legislation.—A number of the States have passed Acts looking toward an improvement in the physical condition of the people, and nearly all of the States have now stringent laws with respect to the prevention of communicable diseases. In Colorado the statute requires a physical examination of all children attending the public schools, and in Ohio, in addition to the children themselves, there must be a medical inspection of the school premises. In Colorado, Florida, Kansas, Michigan, Montana, Nebraska, New Hampshire, North Dakota, and Oregon provision is made for a sanatorium for the use of tubercular patients, and bureaus are established for research and other laboratory work in order, if possible, to increase facilities for the detection of the disease and to take immediate steps for its prevention, or at least for its control. Illinois has increased the rigour of its laws with respect to the inspection and regulation of barbers' shops. The new Act provides for a board of examiners of three persons, to be appointed by the governor, and to consist of practical barbers, who shall hold examinations and inspect barbers' shops and issue certificates of registration, which shall be issued only to those having the requisite skill and sufficient knowledge of common diseases of the face and skin to avoid the aggravation or spreading of such diseases. Any one attempting to follow the occupation of a barber unless he shall first have obtained a certificate of registration shall be guilty of a misdemeanour.

Several of the States have passed laws for the regulation of hotels and to provide for their sanitary inspection. As an example of these laws, the Act of South Dakota defines a hotel as a place where sleeping accommodation is furnished for hire to transient guests, with or without meals. Every hotel shall pay an annual licence of \$1 for every five rooms or less. Out of the fund thus created an inspector and deputies are provided, who are granted police power to enter any hotel to inspect its sanitary condition, and to ascertain if it is provided with the requisite appliances for escape in case of fire. If the inspector finds that it complies with the statutory requirements he must issue a certificate to that effect. Such certificate must be kept posted in a conspicuous place in the inspected building.

Indiana, Missouri, Nebraska, New Jersey, and Utah have enacted laws providing for the sanitation of shops in which food is sold or is prepared, to secure cleanliness as well as to see that pure food only is furnished to the public. The New Jersey statute requires that all buildings or places where food is prepared shall be properly lighted, drained, plumbed, and ventilated, and that the operations carried on therein shall be conducted in such a manner that the purity and wholesomeness of the food prepared and sold shall not be impaired. The walls, floors, and furniture must be kept clean and protected from flies and dirt, and the clothing of the operatives must likewise be kept clean.

Ethical Teaching.—The Illinois legislature has passed an Act making it the duty of every teacher in a public school in that State to teach to the pupils thereof honesty, kindness, justice and moral courage, for the purpose of lessening crime and raising the standard of good citizenship. The Act contains provisions as to the details of such instruction, and prescribes that not less than one half-hour per week shall be devoted, during each term, to instruction in kindness and justice, and in the humane treatment and the protection of birds and animals, and in the important part they fulfil in the economy of nature. It also prohibits any experiments upon any living creature for the purpose of demonstration in any public school of the State.

Mob Violence.—The generally accepted reason for lynch law in the United States is that if a culprit, who is caught red-handed in the commission of a crime, is left to be dealt with by the Courts, his counsel will eventually procure his acquittal by delays of the trial and the interposition of legal technicalities. In certain localities bands of masked men known as "night riders" have terrorised individuals to prevent them from voting or from committing acts distasteful to the "riders." To prevent this class of offences the Arkansas legislature passed an Act which provides that two or more persons who unite for the purpose of doing an unlawful act, or who while armed or disguised shall intimidate any person, and all persons who knowingly attend a meeting for such purpose, shall be guilty of felony and punishable by confinement in the penitentiary for a term not to exceed five years. If such persons go forth at night or at any time disguised, and intimidate or attempt to intimidate any person by assault, destruction of property, or post or deliver any written or printed note calculated to intimidate them, they shall be guilty of felony punishable by from two to ten years' imprisonment. If any person seeks to intimidate by writing or token (such as delivering a bundle of switches or matches), or deliver any message purporting to come from such unlawful band, he shall be guilty of felony, punishable by imprisonment from one to seven years. A further Act provides that when mob violence is threatened the sheriff shall write to the judge of the trial Court and request a special term of Court. The judge shall ascertain that the fear of mob violence is well founded, and shall then empanel a special grand jury and provide the necessary judicial machinery and begin the trial within ten days.

In case the trial judge is ill, or otherwise unable to hold Court, he shall call the special term, and the bar in attendance upon the Court shall elect a special judge to preside in the absence of the regular judge. If the defendant takes a change of venue, the trial shall be fixed in such changed venue within ten days.

“Hazing” or ragging, or the intimidation of students, was the subject of legislation in California, Iowa, Nebraska, and Rhode Island. The laws provide in substance that it shall be unlawful for any pupil enrolled in any school to join, or become a member of, any secret fraternity wholly or partly formed from the membership of pupils attending such schools.

BRITISH EMPIRE.

I. BRITISH ISLES.

I. UNITED KINGDOM.¹

Acts passed—Public General, 49 ; Local and Personal, 164 ; Private, 1
(not printed).

Army.—The Annual Army Act is one of the few really Imperial measures passed at Westminster. Its provisions are not in force without specific enactment by the local Legislatures, but it has been adopted almost throughout the Empire. Doubts had arisen as to its application in Canada, and other difficulties had been raised in regard to the powers of the Governors of Crown Colonies. These are set at rest by c. 3 (B.E.).² So far as it concerns the United Kingdom the chief object is to transfer to the Army Council the greater portion of the powers of the Secretary of State and all of those of the Commander-in-Chief and Adjutant-General under the Army Act.³ The use of mechanical traction for the purposes of mobilisation is legalised and “the occupiers of all public buildings, dwelling-houses, warehouses, barns, and stables” are rendered liable to have forces billeted upon them in case of emergency.

Assurance Companies.—The Assurance Companies Act (c. 49, U.K.) was the only consolidating Act passed during the session. S. 36 came into force at once. It legalised assurances estimated to number ten millions taken out by poor people, who had no legal insurable interest, with friendly societies. It is sufficient now to show that the insurer had at the time a *bona fide* expectation of incurring expenses in connection with the funeral of the assured, and that the sum is not an unreasonable provision to cover those expenses.

The remainder of the Act did not come into operation until July 1, 1910. It incorporates the provisions of the Life Assurance Companies Act, 1870,⁴

¹ This section is based upon the article entitled “The Legislation of the Session” in *The Times* of January 4, 1910.

² The letters B.E., U.K., E., S., and I. signify application to the British Empire, the United Kingdom, England (including Wales), Scotland, and Ireland.

³ 44 & 45 Vict. c. 58.

⁴ 33 & 34 Vict. c. 61.

1871,¹ and 1872,² and of the Employers' Liability Insurance Companies Act, 1907.³ It also brings within their scope companies engaged in bond investment business⁴—that is, the business of issuing bonds or endowment certificates by which the company, in return for subscriptions payable at periodical intervals of two months or less, contract to pay the bondholder a sum at a future date. The principal change in the law is to place foreign companies on the same footing as English companies, and all are required to deposit a bond of £20,000 and make returns in the prescribed form to the Board of Trade.

The Act applies to all companies (exclusive of friendly societies and trade unions) engaged in life, fire, accident and employers' liability insurance and bond investment business. The Act also applies to companies constituted outside the United Kingdom which carry on business therein, whether incorporated or not. A company transacting only marine or plate glass insurance does not come within the scope of the Act, from which is also excluded a member of Lloyd's or of any other association of underwriters approved by the Board of Trade, provided that he complies with the requirements set forth in a schedule. An association of employers for mutual insurance against liability for compensation to workmen is likewise exempt. Special classes of business are subject to some modifications of the general provisions.

To all the companies within the Act is extended the obligation, previously resting only on life insurance companies, to deposit £20,000 with the Paymaster of the Supreme Court. The sum remains in court as a security for the policy-holders. The deposit will have to be made for each class of business, though the exceptions as to combinations of different branches have the effect that the maximum deposit will be £60,000, and that can only be required in the exceptional case of a company engaged in life and employers' liability insurance and bond investment business. Under certain conditions the deposit may be withdrawn except in the case of life insurance companies, when it remains permanently in court. The details of administration in regard to these deposits and also those made by underwriters are defined in the Rules made under the Act on June 6.

A group of sections is devoted to secure as far as possible the financial stability of the companies. The accounts of the different classes of the company's business must be kept separate, and funds held for the benefit of one class must not be applied to the liabilities of another. The accounts of underwriters are also made subject to audit. Every five years, if not more often, a complete actuarial examination must be made of an insurance company's accounts and an abstract of accounts deposited with the Board of Trade in a form prescribed in the Act. The Rules under the Act define

¹ 34 & 35 Vict. c. 58.

² 35 & 36 Vict. c. 41.

³ 7 Ed. VII. c. 46.

⁴ See Report of the Departmental Committee on Bond Investment Companies, 1906, d. 2769, 2770.

the qualifications required in the actuary signing the returns. The shareholders and policy-holders are entitled, on application, to have a copy of the balance sheet, a list of shareholders and a copy of the deed of settlement, if the company is not registered under the Companies Act. The same publicity attends the amalgamation under the direction of the Court of two or more companies. Any document deposited with the Board of Trade in pursuance of the Act shall be open to inspection. A section added to the original Bill requires any published statement in regard to the capital of an insurance company to contain particulars of the amounts subscribed and paid-up. The whole purpose of the Act is to bring insurance business under more efficient supervision.

Cinematographs.—The serious accidents in connection with cinematograph exhibitions led to the passing of the Cinematograph Act (c. 30, U.K.) for securing greater safety by requiring the premises in which they are held to be licensed by a county council. The regulations made by the Home Office under the Act were gazetted on December 21, 1909.

Education.—The Local Education Authorities (Medical Treatment) Act (c. 13, E.) enables them to recover from the parents the cost of medical treatment, but no parent is obliged to submit his child to medical inspection.

The Education (Administrative Provisions) Act (c. 29, E.) removes all restrictions in regard to delegation by local education authorities to education committees, except that no power is to be given to them in regard to raising money. Councils are authorised to combine for the purposes of Part II. of the Act of 1902¹ in connection with secondary education and colleges. Land acquired for educational purposes by a local authority may be used for any other object approved by the Local Government Board. Another section directs attention to a curious oversight on the part of the Board of Education, who have been accustomed to make signed agreements with young people entering training colleges for the repayment of some portion of the cost upon their failure to follow the profession of a teacher. It has been customary to stamp these agreements, but since they were made with infants the documents were valueless as a basis for legal proceedings. A section in the Act makes the sums repayable by the maker of the agreement as debts against the Crown "notwithstanding that he was an infant at the time when the undertaking was given."

Electric Lighting.—The Electric Lighting Act (c. 34, U.K.) had been before Parliament in the form of a bill for some considerable time, and had for its chief objects to remove difficulties which had been experienced in the working of the Electric Lighting Acts, and to make general a series of provisions usually inserted in local Acts. In addition there is a section for the protection of the Royal palaces, parks and gardens, museums, and other public buildings and their contents by permitting a representative of

¹ 2 Ed. VII. c. 42: see *Legislation of the Empire*, vol. i. p. 93.

the Commissioner of Works to inspect any generating station in order to see that proper precautions are adopted for the consumption of smoke, for preventing so far as reasonably practicable the evolution of oxides of sulphur, and generally for the prevention of nuisance in relation to the protected premises. In the event of any neglect in these respects the Commissioners may require the undertakers to carry out such works and to do such things as are necessary in the circumstances.

Finance.—The session was memorable for the fact that the annual Finance Act making the usual provision for the requirements of the country did not pass into law owing to the objection by the House of Lords that it contained requirements which could not be regarded as strictly financial. Chapters 1, 2, 5 and 6, however, were concerned with finance and contained no features of note. The Revenue Act (c. 43, U.K.) dealt with the procedure for the collection of customs duties and stamping of documents.

The Development and Road Improvement Funds Act (c. 47, U.K.) is not merely a money measure as its short title implies, but contains important provisions "to promote the economic development of the United Kingdom and the improvement of roads therein."

The first part enables the Treasury to make grants for the purpose of aiding and developing agriculture and rural industries, forestry, the reclamation and drainage of land, the improvement of rural transport (other than roads), the construction and improvement of harbours and canals, the development and improvement of fisheries, and any other purpose calculated to improve the economic development of the United Kingdom. Agriculture and rural industries are defined to include agriculture, horticulture, dairying, the breeding of horses, cattle, and other live stock and poultry, the cultivation of bees, home and cottage industries, the cultivation and preparation of flax, the cultivation and manufacture of tobacco, and any industries immediately connected with and subservient to any of the said matters. For the purpose of carrying out this portion of the Act a body of five Development Commissioners is constituted of whom two are to be paid salaries not exceeding £3,000 per annum. Under the second part of the Act a Road Board with a paid chairman and vice-chairman is constituted, for the purpose of improving the facilities for road traffic. They may do so by making advances to highway authorities for the improvement of existing roads or construction of new roads, or themselves construct and maintain them. Compulsory powers are given to the Road Board to purchase land on either side of the proposed road within 220 yards of the middle of it. By this means the Road Board will receive the increment in the value of the land arising from the making of the new road.

Fisheries.—The Trawling in Prohibited Areas Prevention Act (c. 8, U.K.) has for its object the protection of fishermen of the United Kingdom, by

placing an indirect check upon foreign fishers. The procedure adopted is to prevent them from landing the fish in this country, as it is argued that only in very exceptional cases will it be profitable for the foreigner to take the fish into his own ports. The Bill, as introduced, applied only to Scottish waters, but was extended to Ireland in its course through Parliament. The Act is officially described as relating to the United Kingdom.

Government Departments.—A series of small Acts deal with the *personnel* of the Government Departments. The Board of Trade Act (c 23, U.K.) authorises an increase in the salary of the President, owing to the greater importance of the office since the amount was fixed in 1826.¹ The Assistant Postmaster General Act (c. 14, U.K.) enables an Assistant Postmaster General to sit in the House of Commons; and the Board of Agriculture and Fisheries Act (c. 15, U.K.) permits the appointment of a Secretary of the Board.

Housing and Town Planning.—The portion of the Act relating to housing amends the earlier Acts and makes the law of Scotland correspond to that of England. The Act does not apply to Ireland. The aim of the Act is to simplify the procedure and extend the powers for improving housing conditions. The Local Government Board is substituted for Parliament as the confirming authority for schemes dealing with Part I. of the principal Act of 1890 or for reconstruction schemes under Part II., or for exercising compulsory powers of purchase for the purpose of Part III. Local authorities instead of applying to a magistrate for a closing order of an unhealthy area may make the order themselves, and an appeal against it, instead of being to quarter sessions, is to the Local Government Board. Part III. of the Act of 1890 is now of general application instead of being adoptive. The old procedure for compulsory purchase of land is superseded by a new one set forth in a schedule. County councils may promote societies having for their object the erection or improvement of dwellings for the working classes. The terms for housing loans are made more favourable. In order to secure a better enforcement of the Act the Local Government Board is given powers for the coercion of local authorities. A public health committee must be established by every county council. The law is strengthened in regard to the liability of landlords so as to compel them to maintain premises in a fit condition. Generally speaking back-to-back houses are forbidden and sleeping rooms below a certain level are regarded as unfit for habitation. The conditions of the appointment of medical officers of health are also amended with a view to give them greater independence and render the service more efficient.

The portion of the Act relating to Town Planning has attracted the most attention. Its object is to secure that growing towns shall

¹ 7 Geo. IV. c. 32.

extend methodically instead of in the present haphazard manner. With that aim it enables local authorities to prepare schemes to control the development of building land in or neighbouring on their area. The scheme must be submitted to the Local Government Board, and having obtained their approval becomes law, unless objection is raised, when the order of the Board must be laid on the table of the House in order to give opportunity to an address to the Crown to be presented against it. Local authorities may combine in the preparation and enforcement of schemes. This portion of the Act, like much other recent legislation, is merely a skeleton to be clothed with regulations of the Local Government Board. The Act intends that efforts shall be made to secure the co-operation of owners and others interested in the land by conferences and such other means so that the schemes may receive general approval. After the town planning scheme is made by the central authority, the local authority has strong powers to enforce it. They may "remove, pull down, or alter any building or other work in the area included in the scheme which is such as to contravene the scheme, or in the creation or carrying out of which any provision of the scheme has not been complied with, or execute any work which if it is the duty of any person to execute under the scheme in any case where it appears to the authority that delay in the execution of the work would prejudice the efficient operation of the scheme." Any expenses thus incurred by a "responsible authority" may be recovered from the persons in default. The basis of compensation to owners is laid down in the Act, and on the other hand the local authority may make a claim for betterment. The Local Government Board has power to take action in the place of a local authority failing to make a town planning scheme.

Labour.—The Board of Trade have established Labour Exchanges in accordance with the Labour Exchanges Act (c. 7, U.K.). The Board may maintain them or assist local authorities or voluntary bodies to do so by collecting and furnishing information as to the requirements of employers. The Board may appoint advisory committees somewhat similar to the Consultative Committee of the Board of Education.¹ The Board may make regulations which may include the conditions upon which loans can be made to work-people for their travelling expenses to places where work has been found for them. But no person shall suffer any disqualification or be otherwise prejudiced by a refusal to work where there is a strike or at a lower rate of wages than those current in the trade in the district where the employment is found. False representations for the purpose of obtaining work are punishable upon summary conviction by a fine of £10. An important use of the machinery of this Act will be to guide the large amount of young labour as it leaves the schools into satisfactory channels.

¹ See *Legislation of the Empire*, vol. i. p. 29.

The Trade Boards Act (c. 22, U.K.) is another medium for legislative control over the conditions of labour. It follows the lines of Australian legislation.¹ Unless extended to other trades by Provisional Order, the Act applies only to tailoring, lace-making, and the manufacture of boxes and chains. The constitution of the trade board is left for supplementary regulations, but employers and workpeople are to be represented in equal proportion. The Board of Trade are to select a chairman from among the members and appoint a secretary to be paid by the Treasury. The Board of Trade have also the appointment of a number of members, not more than half the number of representative members. They may, and for trades in which women are largely employed must, include a woman. The members appointed by the Board of Trade are to be paid by the Treasury, and the ordinary members may receive their expenses, including compensation for loss of time. District trade committees, to which the trade boards may delegate any of their powers, may be appointed, to consist of members of the trade board and co-opted members.

The general duty of the trade board is to consider any matter in reference to the industrial conditions of the trade upon a reference from a Government department and to make a report. Their specific duty is to fix a minimum rate of wages for time work and piece work in the different trades under their authority. The probability of finding that duty impossible of accomplishment is anticipated by allowing the Board of Trade to relieve them of it upon a report to that effect. Detailed provisions are made with a view to securing the gradual enforcement of the determined rate of wages. The employer is liable to a fine not exceeding £20 for each offence in paying below the rate fixed by the Board, and £5 for each day on which the offence is continued after conviction. The Court may also order a payment to be made to the worker equivalent to the deficiency. Permits may be granted by the Board for the employment at a lower rate of workers incapacitated in some way from working at full strength. The burden of proof as to the payment of the full amount lies upon the employer. The trade board may take proceedings on behalf of the worker, but before doing so are required to take reasonable steps to bring the facts to the notice of the employer with a view to a settlement without recourse to legal proceedings.

The Board of Trade are empowered to appoint inspectors to assist in carrying out the Act; £15,000 was the amount appropriated for the expenses incurred under the Act in the first year, but it is clear that the cost must be much more in a short time unless the Act is very limited in its operation.

Marine Insurance.—A "P.P.I." policy is a policy of marine insurance made by a person who does not require to prove any interest beyond holding the policy itself. The policies were void in law, but in practice were never

¹ See, for example, the South Australian Act, *Legislation of the Empire*, vol. ii. p 55.

repudiated. The policies, however, encouraged gambling, not only financial, but in human lives. A vessel heavily mortgaged and over-insured left port in a bad state of repair with a dangerous cargo. She became the subject of insurance by people whose only interest was that she should sink. The object of the Marine Insurance (Gambling Policies) Act (c. 12, U.K.) is to stop the nefarious practice by making it a criminal offence for a person to effect a contract of marine insurance without having some *bona fide* interest or expectation of interest, direct or indirect, in the safety of the vessel or subject-matter insured. Thus genuine business which has been done by means of these policies will be protected by the insurer proving that he had a *bona fide* interest in the safety of the matter insured.

Motors.—The Motor Car (International Circulation) Act (c. 37, U.K.) permits effect to be given by Order-in-Council to any convention for facilitating the international circulation of motor-cars by granting passes or other requirements to persons resident in the United Kingdom for travelling abroad, and by registering foreigners motoring in this country.

Navy.—The Navy is the subject of three Acts. C. 18 (U.K.) is the Naval Establishments in British Possessions Act. Upon a representation of the Admiralty and Treasury any property held for naval purposes in any British possession may be transferred to the Governor and the way be so prepared for carrying out the recommendations of the Imperial Defence Conference. By the Colonial Naval Defence Act (c. 19, U.K.) volunteers enlisted under the provisions of the Colonial Naval Defence Act, 1865,¹ shall form part of the Royal Naval Volunteer Reserve and upon an emergency may be subject to the conditions of service in the Navy. The Naval Discipline Act (c. 41, U.K.) affects the disciplinary portion of those conditions by enabling the punishment of "detention" to be substituted for imprisonment for certain offences against the Naval Discipline Act,² in order to avoid the stigma of imprisonment in the case of those men who have been convicted for some offence, but not dismissed from the service. The ships or buildings set apart for this punishment are to be called "naval detention quarters."

Oaths.—The aim of the Oaths Act (c. 36, E. and I.)³ is to provide a more sanitary method of administering the oath than kissing the Bible. It enacts that "any oath may be administered and taken in the manner following: The person taking the oath shall hold the New Testament, or in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words 'I swear by Almighty God that . . . ' followed by the words of the oath prescribed by law."

Superannuation.—Two Acts are concerned only with the subject of superannuation. The Superannuation Act (c. 10, U.K.) reduces the allowance to

¹ 28 & 29 Vict. c. 14.

² 29 & 30 Vict. c. 109.

³ Adopted in Hong-Kong by Ordinance No. 3 of 1910.

civil servants while safeguarding the rights of existing officials. The Asylum Officers' Superannuation Act (c. 48, U.K.) makes provision for asylum officers, who are divided into two classes—(1) those having the care or charge of the patients, and (2) all other established officers and servants of those institutions.

Workmen's Compensation.—A modification is made in the Workmen's Compensation Act, 1906,¹ by the Workmen's Compensation (Anglo-French Convention) Act (c. 16, U.K.) embodying arrangements for British subjects to have the same right as French subjects in France and *vice versa*.

Scotland.—Three small Acts applied only to Scotland. The Prisons Act (c. 27) provides for the appointment of women as members of visiting committees for prisons. The Summary Jurisdiction (Scotland) Act, 1908, Amendment Act, 1909 (c. 28), removes doubts as to the manner in which accused persons may be detained in custody pending trial, under the provisions of the Summary Jurisdiction (Scotland) Act, 1908.² The Wild Animals in Captivity Protection (Scotland) Act, 1909 (c. 33), extends to Scotland the Wild Animals in Captivity Protection Act, 1900.³

Ireland.—The condition of the money market having combined with other causes to render unworkable the Irish Land Act, 1903,⁴ amendments were effected by the Irish Land Act, 1909 (c. 42).⁵ S. 1 of the new Act alters the amount of the purchase annuity in the case of advances made in pursuance of future purchase agreements from £3 5s. to £3 10s. for every £100 of the advance. The increase in the rate of repayment throws an increased burden on purchasers, whose annuities will be correspondingly increased. As a result of this increased rate of interest the Treasury are given power to create a new capital stock to be called Guaranteed Three per cent. Stock. By s. 27 of the Act of 1903 advances for the purposes of the Act were to be made in money, but s. 3 of the Act of 1909 enables advances to be wholly or in part by means of stock. Under the Act of 1903 any loss upon the flotation of stock fell upon the Irish tax-payer, but by the new Act the Treasury undertakes to meet the burden of this loss in future agreements out of public funds, so that the only liability likely to be incurred by the tax-payers of Ireland is that which may arise from non-payment of the annuities. By the Act of 1903 a bonus at the rate of 12 per cent. of the purchase money was given to induce vendors to sell, but the total fund was limited to twelve millions. This limitation is repealed and a sliding scale of bonus substituted in its place. The Act also provides for making good any deficiency in the issue of stock at a discount or in respect of interest or sinking fund. Part II. deals with Land

¹ 6 Ed. VII. c. 58: see *Legislation of the Empire*, vol. i. p. 131.

² 8 Ed. VII. c. 65: see *Journal*, N.S. vol. x. p. 300.

³ 63 & 64 Vict. c. 33: see *Legislation of the Empire*, vol. i. p. 46.

⁴ 3 Ed. VII. c. 37: see *Legislation of the Empire*, vol. i. p. 113.

⁵ In summarising this Act use has been made of three articles in the *Irish Law Times*, December 18, 1909, January 1 and 8, 1910.

Purchase. Under the Act of 1903, the Land Commission, when they considered it expedient, were authorised to advance to any tenant for the purchase of a holding a sum of £7,000; the new Act cuts this down to £5,000 and makes the normal advance a sum not exceeding £3,000. S. 17 repeals s. 2 of the Act of 1903, and provides that in the case of the sale of an estate advances may be made for the purchase of parcels of land as distinct from holdings (a) to tenants of holdings or proprietors of holdings not exceeding £10 in rateable value; (b) to persons who have surrendered their holdings for the purpose of relieving congestion; (c) persons who within twenty-five years before the passing of the Act of 1903 were tenants of holdings at the date of the purchase; and (d) any other person to whom the Land Commission think an advance ought to be made. Part III. of the new Act reconstitutes and incorporates the Congested Districts Board. The Chief Secretary, the Under-Secretary to the Lord Lieutenant, and the Vice-president of the Department of Agriculture and Technical Instruction are to be *ex officio* members. Nine members are to be appointed for terms of five years by the Crown, and two others, to be remunerated by a salary of £2,000 per annum, to hold office during pleasure. Certain duties of the Congested Districts Board are to be transferred to the Board of Agriculture, and three members from each will form a consultative committee for the co-ordination of business in relation to sea fisheries. The Estates Commissioners have strong powers given to them for the compulsory purchase of land, but in certain circumstances the persons interested may apply to the Judicial Commissioner for an order to restrain them. An appeal lies from his decision to the Court of Appeal.

Five minor Acts also apply to Ireland only. The Health Resorts and Watering Places (Ireland) Act (c. 32) empowers local authorities in Ireland to strike a rate for advertising health resorts and watering places. The Act embodies a new departure in the legislation of the United Kingdom, though for some years public money has been used to advertise the advantages of other parts of the Empire.¹ The Irish Handloom Weavers Act (c. 21) and the Merchandise Marks (Ireland) Act (c. 24) are concerned with the protection of Irish manufactures by requiring the trade mark to be woven in certain goods and allowing the Department of Agriculture and Technical Instruction to prosecute infringements of the Merchandise Marks Acts. To the same department is given by the Weeds and Agricultural Seeds (Ireland) Act (c. 31) authority to take measures to prevent the spread of noxious weeds and to test the purity and germination of agricultural seeds. The Local Registration of Title (Ireland) Act (c. 36) makes provision with respect to the application of the Local Registration of Title (Ireland) Act 1891,² to the County of Cork.

India.—The Indian Councils Act (c. 4), with the regulations made thereunder, forms the subject of a separate article by Sir Courtenay Ilbert.³

¹ For example, by the New Brunswick Act passed in 1898: see *Legislation of the Empire*, vol. i. p. 245.

² 54 & 55 Vict. c. 66.

³ *Supra*, p. 243.

South Africa.—The South Africa Act (c. 9), setting forth the terms of union of the South African Colonies, has been analysed in an article by Mr. A. Berriedale Keith.¹

Isle of Man.—The Isle of Man (Customs) Act (c. 45) is one of the usual Acts dealing with the customs of the island.

London and Liverpool.—The Metropolitan Ambulances Act (c. 17) authorises the County Council to establish and maintain an ambulance service. The Police Act (c. 40) amends the Acts relating to the Metropolitan Police who serve a larger area than the County of London, and makes better provision for the widows and children of constables who have lost their lives in the execution of their duty. A Special Commissioner having been appointed to hold an inquiry respecting the conduct of the police of the City of Liverpool, the object of the Police (Liverpool Inquiry) Act (c. 35) was to give him the powers conferred upon the Metropolitan Police Commission in 1906.²

2. THE ISLE OF MAN.

[*Contributed by HIS HONOUR S. STEVENSON MOORE, First Deemster.*]

The Legislature passed in 1909, besides several Acts of a private nature, the Factories and Workshops Act, for the inspection of and regulation of employment in factories, etc.; a Partnership Act, codifying the law on the subject, and legalising for the first time "limited partnerships"; also the White Phosphorus Matches Prohibition Act, prohibiting the use of white phosphorus in the manufacture of matches and the sale of such matches.

3. JERSEY.

[*Contributed by E. T. NICOLLE, Esq.*]

An important Law on Procedure in Civil and Criminal Cases was passed by the States on April 23, 1908, and sanctioned by Order-in-Council August 1, 1908.

Art. 1 provides that in all civil cases the parties and their relations may be heard as witnesses; but married persons cannot be obliged to reveal communications made to each other.

Art. 2 provides that in all prosecutions the parents or relations of an accused person may be heard as witnesses either for the prosecution or for the defence, with the exception of the husband or wife of an accused person, who cannot be obliged to bear witness unless the crime or misdemeanour has been committed against the husband or the wife called as a witness.

¹ See Journal, vol. x. N.S. p. 40.

² 6 Ed. VII. c. 6: see *Legislation of the Empire*, vol. i. p. 135.

The accused person and the husband or wife of an accused person may be heard as witnesses for the defence, provided that :

- (1) An accused shall not be called as a witness except upon his own request.
- (2) No comment shall be made should he or she not give evidence.
- (3) The wife or husband of the person accused shall only be called at the request of the accused.
- (4) Neither husband nor wife shall be compelled to disclose communications which have passed between them.
- (5) An accused called as a witness may be asked any questions, although the replies thereto may tend to incriminate him or her as to the offence charged.
- (6) An accused called as witness shall not be obliged to reply to a question tending to show he has committed or been accused of having committed or has been convicted of some other offence or that he is of bad character, unless—

- (a) the proof that he has committed or been convicted of such other crime is admissible evidence that he is guilty of the offence of which is actually accused, or
- (b) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his good character or has himself given evidence to that effect, or the nature of the defence is such as to involve imputations on the character of the complainant or of the witnesses for the prosecution ; or
- (c) he has given evidence against another person charged with the same offence.

Art. 3 provides that any person convicted for a crime or misdemeanour, whether actually undergoing sentence or not, shall be allowed to give evidence in all cases.

The remaining Articles of the Bill apply to local procedure.

There was no legislation passed in 1909 of sufficient importance for review.

4. GUERNSEY.

Prescription.—"Loi relative à la Prescription Immobilière."—By the ancient law of Normandy in force in the island the period required for prescription in matters concerning realty was forty years. By a Law sanctioned in 1852 the period was reduced to thirty years, and by the present Law it is still further reduced to twenty years.

Marriage.—"Loi relative au mariage avec la sœur d'une femme décédée" reproduces the English Act of 1907.¹

Incest.—"Loi pour la Punition d'Inceste" is in the same terms as the English Act of 1908.²

¹ 7 Ed. VII. c. 47 : see *Legislation of the Empire*, vol. i. p. 153.

² 8 Ed. VII. c. 45 : see *Journal*, N.S. vol. x. p. 296.

II. BRITISH INDIA.

[*Contributed by* SIR COURTENAY ILBERT, K.C.B., K.C.S.I.]

I. ACTS OF GOVERNOR-GENERAL IN COUNCIL.

Acts passed—7.

Steamships.—The objects of the Indian Steamships Law Amendment Act, 1909 (No. 1), are to extend the provisions of the Acts relating to steamships (6 and 7 of 1884) to vessels propelled by electricity or other mechanical power, to require certificates of survey from foreign as well as from British steamships, and to facilitate the grant of these certificates.

Currency.—The Indian Paper Currency (Amendment) Act, 1909 (No. 2), gives the five-rupee currency note currency in Burma as well as in other parts of India. Its currency had previously been excluded from Burma.

Insolvency.—The Presidency-towns Insolvency Act, 1909 (No. 3), is an important and useful measure which establishes for the three Presidency towns and for Rangoon an insolvency law framed on the same general lines as the English Bankruptcy Act of 1883.¹ Previously the insolvency law in the Presidency-towns had been regulated by an Act of Parliament passed in 1848,² and representing the English bankruptcy law as it stood before the changes made in 1869 and in 1883. Several attempts had been made by successive law members of Council to substitute for this antiquated law one more in accordance with the lines on which bankruptcy and insolvency legislation has proceeded elsewhere, but technical difficulties stood in the way. One of the difficulties was that the Act of 1848, being an Imperial Act, could operate, for vesting property and other purposes, outside British India, whilst an Indian Act could not. But those who are entitled to speak with authority on the practical working of the bankruptcy law in India are now of opinion that this difficulty is more theoretical than substantial, and that s. 118 of the English Bankruptcy Act, 1883, requiring all British Courts exercising jurisdiction in insolvency and bankruptcy to act in aid of each other, supplies practically all the external support which the Indian Insolvency Courts require.

In these circumstances the late law member, Sir Erle Richards, persuaded the Legislative Council that they might with great advantage and with safety repeal the Act of 1848, and replace it by an Indian Act on modern lines. This was the last Act which Sir Erle Richards passed through the Council; and he is warmly to be congratulated on having solved a problem which baffled many of his predecessors. It will be remembered that he had in

¹ 46 & 47 Vict. c. 52.

² 11 & 12 Vict. c. 21.

1907 cleared the way by carrying through an Act dealing with insolvency outside the Presidency-towns.¹

Whipping.—The Whipping Act, 1909 (No. 4), consolidates with amendments the general Indian enactments on this subject. Whipping was deliberately excluded from the category of punishments recognised by the Indian Penal Code of 1860, but was authorised as a punishment for certain offences by the Whipping Act, 1864, which was afterwards amended by sundry enactments, including an Act of 1900.² Those who are interested in the history of Indian official opinion and legislation on this subject may study, in the proceedings of the Governor-General's Council, the long speech delivered by Mr. Dadhaboy on March 22, 1909. The Act of 1909 narrows and defines with somewhat greater precision the classes of cases in which whipping may be inflicted.

Whipping may be inflicted in lieu of any other punishment for the following offences under the Penal Code :

- (a) theft as defined in s. 378, other than theft by a clerk or servant of property in possession of his master ;
- (b) theft in a building, tent, or vessel ;
- (c) theft after preparation for causing death or hurt ;
- (d) lurking house-trespass or housebreaking in order to the commission of an offence punishable with whipping.

Whipping may be inflicted either in lieu of or in addition to any other punishment for—

- (a) abetting or attempting to commit rape ;
- (b) compelling or inducing by fear of bodily injury to submit to an unnatural offence ;
- (c) voluntarily causing hurt in committing or attempting to commit robbery ; or
- (d) committing dacoity.

These restrictions apply to adults. For juvenile offenders the provisions are more general.

Any juvenile offender who abets or commits or attempts to commit (a) Any offence punishable under the Indian Penal Code, with certain specified exceptions, or (b) any offence punishable under any other law with imprisonment which the Government of India may, by notification in the *Gazette*, specify in that behalf, may be punished with whipping in lieu of any other punishment. The expression "juvenile offender" means a person under sixteen years of age, and the finding of the Court is conclusive on this point.

In frontier tracts and other wild regions a greater latitude is given by s. 7. Under that section, whenever any local Government has, by notification, declared the provisions of this section to be in force in any frontier district or wild tract of country, then, for offences subsequently committed in that

¹ See *Legislation of the Empire*, vol. iii. p. 25.

² *Ibid.* p. 9.

district or tract, and punishable with imprisonment for three years and upwards, whipping may be substituted for any other punishment.

Army.—The Amending (Army) Act, 1909 (No. 5), makes in the Acts relating to the Indian Army some formal amendments rendered necessary by recent changes in the rank and designation of generals commanding in India, and also—

- (1) amends the law regulating the admission of soldier lunatics into asylums;
- (2) empowers the commanding officers of volunteer corps to remove from the roll the names of non-effective members; and
- (3) gives better control over the sale and supply of spirituous liquors and intoxicating drugs in cantonments.

Volunteers.—The Indian Volunteers (Amendment) Act, 1909 (No. 6), provides that any member of the Territorial Forces who is attached to a volunteer corps in India shall, while so attached, be subject to the Indian Volunteers Act.

Marriage.—The object of the Anand Marriage Act, 1909 (No. 7), is to remove doubts as to the validity of marriages between Sikhs solemnised in accordance with the marriage ceremony called Anand. The Act is short, simple, and permissive in character. It does not define what is meant by a Sikh. It does not describe the ceremony known as Anand. These things are wisely assumed to be known by the persons interested and affected. Nor does it make the observance of any particular forms or ceremonies obligatory on any class of persons. The speeches made in Council on August 27 and December 22, 1909, by the Sikh gentlemen who promoted the Bill, by Sir Louis Dane, the Lieutenant-Governor of the Punjab, and by that high authority on Indian castes, Sir Herbert Risley, are of great interest from the light which they throw on the nature of the Sikh community, and on the characteristics of Hindu marriages. According to Sir Louis Dane, there are numerous sub-sections of the Sikhs, as there are of every other religious creed in the world, but the term "Sikh" includes all persons who belong to the Sikh faith, and take the tenets of their religious belief from the writings known as the "Sri Guru Granth Sahib."

2. MADRAS.

Acts passed—7.

Revenue.—The Madras Revenue Recovery Amendment Act, 1909 (No. 1), enables a person interested in land sold for default in payment of revenue to set aside the sale on depositing, within a limited time, a sum equal to 5 per cent. on the purchase money, and also the amount due for arrears of revenue.

Labour and Emigration.—Act No. 2 repeals the Madras Labour and

Emigration Act, 1866, which applied only to emigration to Assam, and had been made unnecessary by legislation of the Government of India on the same subject.

Land.—The Madras Estates Land Act Amendment Act, 1909 (No. 4), corrects certain drafting errors, and clears up some obscurities in the elaborate Land Act of 1908.¹

Municipal Government.—The Madras District Municipalities Act Amendment Act, 1909 (No. 5), confers on the chairman of a district board powers with respect to the supply of water for domestic purposes, and gives Government officers legal protection when they are appointed to carry out water or drainage works on behalf, or in place of, a municipal council.

Acts Nos. 3, 6, and 7 are of no general interest.

3. BOMBAY.

Acts passed—3.

Criminal Tribes.—Act No. 1 validates certain proceedings taken under the Criminal Tribes Act, 1871, with respect to certain criminal tribes in Sind, known as Hurs or Lurs.

Port Authorities.—Act No. 2 enlarges the borrowing powers of the Karachi Port Trust, under their Act of 1886.

Museum.—Act No. 3 provides for the creation, maintenance, and management of the Prince of Wales Museum of Western India.

4. BENGAL.

Acts passed—5.

Lunatics.—The Indian Lunatic Asylums (Amendment) Act, 1909 (No. 1), facilitates the procedure for dealing with Calcutta lunatics under the general Indian Lunatic Asylums Act of 1858.

Court of Ward.—The Bengal Court of Wards (Amendment) Act, 1909, makes it easier for the Court of Wards to obtain loans for the consolidation or liquidation of the debts of a ward's estate.

Encumbered Estates.—The Chota Nagpur Encumbered Estates Act, 1876, which is amended by Act No. 3 of 1909, belongs to a type of Acts with which Indian legislators are familiar. The amending Act enables the Government to take over the management of an encumbered estate when its holder "has entered on a course of wasteful extravagance likely to dissipate his property," and makes other amendments in the procedure under the original Act.

Act No. 4 is of no general interest.

¹ See Journal, N.S. vol. x. p. 310.

Intoxicating Liquors and Drugs.—The Bengal Excise Act, 1909 (No. 5), is an important measure, which consolidates the enactments relating to the import, export, transport, manufacture, and sale of intoxicating liquors and intoxicating drugs, with amendments based largely on the recommendations of the Indian Excise Committee's Report of 1905-6. The Bill was the subject of long discussions in the Bengal Council, particularly with respect to the restrictions to be placed on the possession and sale of palm sap or *tari*, which as drawn from the tree is not, but when fermented is, an intoxicating liquor, and with respect to the age at which children or young persons should be allowed to be employed in the sale of intoxicating liquor. In some parts of India the tapping of *tari*-producing trees requires a licence, and this restriction is to be experimentally introduced into parts of Bengal. The intoxicating drugs which are excisable articles, and therefore require a licence for manufacture and sale, include ganja, bhang, and other preparations of the hemp plant (*Cannabis sativa*), but do not include opium, which is a Government monopoly. The cultivation of the hemp plant requires an excise licence.

5. EASTERN BENGAL AND ASSAM.

Act passed—1.

Interpretation.—The single Act passed for Eastern Bengal and Assam is called the Eastern Bengal and Assam General Clauses Act, 1909. It contains general definitions and rules of construction, and answers to the Interpretation Act of the English Parliament.

6. UNITED PROVINCES.

No Acts were passed by the Council in 1909.

7. PUNJAB.

Act passed—1.

Criminal Procedure.—The Punjab Courts (Amendment) Act, 1909, extends the power of the Chief Court to review certain criminal cases.

8. BURMA.

Acts passed—7.

Vaccination.—The Burma Vaccination Law Amendment Act, 1909 (No. 1), makes provision for compulsory vaccination in Rangoon and other municipalities. It supplements for Burma the general Vaccination Act (XIII. of 1880), which was passed in 1880 by the Government of India for the several

provinces which did not then possess local legislatures. Under the new Act the health officer may direct the vaccination of any young child who is exposed to infection, and access for purposes of vaccination must be allowed by occupiers of houses, vessels, and other places. A Superintendent of Vaccination may require "unprotected" persons to be vaccinated after notice, and may require inmates of lodging-houses and factories to be vaccinated forthwith. There are also special provisions about immigrants to Burma. Any person who has travelled on board a vessel for the purpose of coming to Burma to work as a labourer may be inspected, and, if found to be "unprotected," may be sent to be vaccinated. Government vessels, whether British or foreign, are exempted from this provision.

Municipal Government.—The Burma Municipal (Amendment) Act, 1909 (No. 2), enables municipalities to make by-laws for regulating or prohibiting the use of barbed wire.

Boundaries.—The Burma Boundaries Act (1880) Amendment Act, 1909 (No. 3), declares that orders passed by a demarcation or boundary officer are to be based on actual occupation, and are not to determine the title to land.

Embankments.—The Burma Embankment Act, 1909 (No. 4), authorises the impressment of labour, in urgent cases, for the repair of river embankments, and empowers Government officers to require the removal of unauthorised embankments.

Fisheries.—The Burma Fisheries (Amendment) Act, 1909 (No. 6), makes sundry amendments in the Fisheries Act of 1905, and, in particular, prohibits the use of poisons and explosives to facilitate the catching of fish.

Opium.—The Burma Opium Law Amendment Act, 1909 (No. 7), strengthens the law against opium smuggling by enabling magistrates to take security for good behaviour under the Code of Criminal Procedure from persons engaged in, or assisting, the unlawful manufacture, transport, importation, sale, or purchase of opium.

There is also a Repealing Act (No. 5), which repeals an obsolete Act and an obsolete Regulation.

9. REGULATIONS UNDER 33 VICT. c. 3.

Regulations made—2.

Certain *talukas* or estates have been transferred from the Central Provinces to the Province of Madras, and Regulation No. 1 brings them, approximately, under the same law as that which prevails in the neighbouring part of the Godavari district.

Regulation No. 2 repeals part of the North-West Province Frontier Law (Justice Regulation) of 1901.¹

¹ See *Legislation of the Empire*, vol. iii. p. 62.

III. EASTERN COLONIES.

I. CEYLON.

[Contributed by LEWIS MAARTENSZ, ESQ., *First Crown Counsel, Ceylon.*]

Ordinances passed—33.

Precedence of Judges.—The Courts (Amendment) Ordinance (No. 3) assimilates the law with regard to the rank and precedence of future Chief Justices and Puisne Justices to that which prevails in other Colonies.

Chief Justices hereafter appointed will take place after the officer in command of His Majesty's Naval Forces on the station if of the rank of an admiral, and the senior officer in command of His Majesty's Troops if of the rank of a General. Future Puisne Justices will take place after Members of the Executive Council.

Noxious Weeds.—The Water Hyacinth Ordinance (No. 4) is intended to prevent the introduction and dissemination of the water hyacinth (*Eichhornia crassipes*) in the Island. Customs officers are empowered to destroy any plant that may be imported, and any person possessing a plant must destroy it. The provisions of the Ordinance prohibiting importation may by proclamation be extended to any other noxious weed or plant.

Crown Lands.—The Crown Landmarks Ordinance (No. 7) provides for the erection and maintenance of permanent landmarks to define the boundaries of lands alienated by the Crown after the coming into operation of the Ordinance. The duty of maintaining the landmarks, replacing or repairing those which have been removed or fallen into disrepair, and of keeping the boundary line between the landmarks clear of vegetation, is cast upon the owner for the time being of such lands. The Government Agent is empowered to call upon owners to replace or repair landmarks and define boundaries, and if they fail to do so, to cause the work to be done and recover the cost by proceedings in the police court.

Indian Coolies.—Ordinance No. 9 gives effect to the recommendations contained in the report of a Commission which sat to inquire into and report on certain questions connected with Labour in the Island.

In form the Ordinance is an amendment of the existing Ordinance (No. 13 of 1889) relating to Indian Immigrant Labourers. By the new Ordinance a prosecution for the offence of illegally quitting service is barred after the lapse of thirty-six months from the commission of the offence. The wages of labourers are payable monthly, within one month of the expiration of the month during which the wages were earned—failure on the part of an employer to pay the wages within the prescribed time is made an offence punishable with a fine which is leviable on the

estate. The imprisonment of Kanganies and labourers on civil process for debt is abolished. A notice to quit service if given by any other person on behalf of the labourer is invalid until the labourer has personally signified to his employer his desire to determine his contract of service. Employers are required to forward to Government Agents in every month a declaration that they have paid the labourers the wages which are then due. The employer is required to prepare and keep up to date a complete register showing all labourers employed by him, including those working on contract. A certified copy of the initial register must be forwarded to the Government Agent. It is made an offence for an employer to take into his employment a labourer (except a Ceylon-born boy or girl under the age of fifteen not previously employed as an estate labourer) without a discharge ticket, or in the case of newly imported labour a certificate from the Ragama Coolie Depot, or a certificate issued by a magistrate that the labourer has not been employed for thirty-six months on an estate in Ceylon. An employer who takes a labourer into his employment without a discharge ticket is, if the labourer is an absconder to whom money has been advanced, liable to pay the lawful employer double the amount of such advance. As a check against vexatious or indiscreet prosecutions of employers the sanction of the Colonial Secretary is required before criminal proceedings can be instituted.

Criminal Law.—No. 10 amends the Penal Code. S. 2 extends the scope of the offence of “abetment” under the Penal Code. As it now stands, a person who in Ceylon abets the commission of an offence outside the Island cannot be punished. The section extends the definition of abetment so as to include the abetment in Ceylon of the commission of offences outside Ceylon. S. 3 provides for the case of a person using, for the purpose of postage, postage stamps issued by any British or foreign country which have been previously used. S. 5, following a recently enacted Imperial Act,¹ provides that sentence of death should not be pronounced or recorded against a person under sixteen years of age.

Marriages of Kandiyans.—Special provision having been made by the amended Kandyan Marriage Ordinance, 1870, for the marriage of Kandiyans, there was considerable doubt whether the marriages of Kandiyans under the general law of the Island² were legal. Ordinance No. 14 (a) removes all doubts as to the legality of such marriages whether past or future, (b) provides that such marriages should as regards the grounds on which the marriages may be dissolved and otherwise be governed by the Marriage Registration Ordinance (No. 19 of 1907),

¹ 8 Ed. VII. c. 67, s. 103: see Seychelles Legislation, *infra*, p. 372.

² Ordinance 19 of 1907 intituled “An Ordinance to Consolidate and Amend the Law relating to the Registration of Marriages other than the Marriages of Kandiyans or Mohamedans.” See *Legislation of the Empire*, vol. iii. p. 85.

the provisions of the General Marriage Ordinance with regard to dissolution being much stricter than the Kandyan Marriage Ordinance—the latter Ordinance, for instance, allows dissolution by mutual consent, and provides that the marriages of Kandyans under the General Marriage Ordinance should not affect the right of the parties to succeed to property according to the Kandyan law of inheritance.

Juvenile Smoking.—No. 21 penalises the selling of tobacco, cigars, cigarettes, or cigarette paper to a person apparently under the age of sixteen years except upon the written order of some responsible person. Police officers are empowered to seize cigars, cigarettes, tobacco, or cigarette papers in the possession of any person apparently under sixteen years of age who is found smoking or chewing tobacco in any street or public place.

Stamps.—No. 22 amends and consolidates and brings up to date the law relating to stamp duty. The Ordinance is based on the Indian Stamp Act, 1899.¹

Privy Council Appeals.—Ordinance No. 31 introduces the Colonial Appeal Rules which have been approved by the Judicial Committee of the Privy Council. These rules were prepared to give effect to the views of the Colonial Conference, 1907: that the right of appeal to the Privy Council should be uniform in the case of all the colonial subjects of His Majesty.

The Ordinance repeals the existing enactments regulating the procedure on appeals from the Supreme Court to the Privy Council; and enacts that such appeals should be subject to the Colonial Appeal Rules which, with some modifications, are appended in a schedule.

2. HONG-KONG.

[Contributed by C. GRENVILLE ALABASTER, ESQ.]

Ordinances passed—46.

Civil Procedure.—Ordinance No. 10 details the procedure for obtaining evidence in the Colony for use in a foreign Court. It also makes provision for the payment by a plaintiff of a subsistence allowance in cases where an absconding defendant is committed to prison under s. 569 (2) of the Code of Civil Procedure (No. 3 of 1901).

Evidence.—No. 3 provides that the certificate of an ambassador, consul, etc., of a foreign Power to the effect that any matter in relation to which an application is made for taking evidence on commission under the Evidence Ordinance (No. 2 of 1889) is a civil or commercial matter, or a criminal matter under the Extradition Act, 1870, and that a tribunal in his country

¹ No. 2 of 1899. See *Legislation of the Empire*, vol. iii. p. 5.

is desirous of obtaining the evidence of a witness, shall be evidence of the matter so certified.

Harbour of Refuge.—By Ordinance No. 39 the Governor is given power to construct and maintain certain additional harbour of refuge works which will enable the small craft, now becoming too numerous for accommodation in the present refuges, to shelter from typhoons. The “bundings,” wharfing, and embanking of a great portion of the foreshore makes it impossible for the large floating population to beach their boats in a storm, and so breakwaters and other artificial refuges are provided to shelter them.

Larceny.—Ordinance No. 7 repeals the sections of the Larceny Ordinance, 1865, which correspond to ss. 75 and 76 of the Larceny Act, 1861,¹ and substitutes for them the provisions of the Larceny Act, 1901.²

Liquors.—The policy of rapidly extinguishing the opium trade initiated by the Home Government rendered it necessary for the authorities to levy duties on intoxicating liquors to balance the loss of revenue from opium. Ordinance No. 27 was consequently passed to make provision for the immediate collection of such duties pending the revision and consolidation of the law relating to intoxicating liquors generally.

An Amending Ordinance (No. 30) provides for the payment to the naval and military authorities, out of the public revenue of the Colony, of an allowance, as a rebate in whole or in part of the duties paid on intoxicating liquors consumed in their messes and canteens.

Magistrates and Criminal Law Amendment (Nos. 1 and 26).—A magistrate is empowered to imprison a defendant for a term not exceeding six months in default of compliance with a recognisance order. Male juvenile offenders may be whipped for any offence whatsoever. Offenders convicted of almost every felony or misdemeanour may now be publicly exposed in the stocks for any period not exceeding six hours. The Magistrates Ordinance, 1890, gives a summary power to impose a fine for perjury and to award compensation for malicious prosecution. The amending Ordinances impose upon the magistrate the duty of first giving the offender an opportunity of explanation. It is made an offence to carry on noisy, noisome, or offensive trades, in breach of any covenant in a Crown lease, without a licence.

Malicious Damage.—The building of a railway in the Colony, intended eventually to be a link in a railway chain from the Colony, through Canton and Hankow in China and the Siberian Railway, to Europe has made it necessary to introduce into the Malicious Damage Ordinance, 1865, sections corresponding to ss. 35 and 36 of the Malicious Damage Act, 1861.³ The Amending Ordinance (No. 28) also imposes penalties for injuries to trees and plants on Crown land.

Merchant Shipping.—Ordinance No. 9 makes various slight amendments

¹ 24 & 25 Vict. c. 96.

² 1 Ed. VII. c. 10. See *Legislation of the Empire*, vol. i. p. 77.

³ 24 & 25 Vict. c. 87.

in the Merchant Shipping Ordinance, 1899, and imposes upon masters the duty of entering in the official log every occasion on which boat-drill is practised and on which life-saving appliances have been examined.

Protection of Women and Girls.—The provisions of s. 9 of the Criminal Law Amendment Act, 1885,¹ are introduced by Ordinance No. 34.

Public Health and Buildings.—Regulations are made for the exhumation and re-interment of bodies, and various slight amendments with regard to the construction of cubicles, etc., are made by Ordinance No. 11 in the principal Ordinance (No. 1 of 1903).²

Public Places Regulation.—The Governor is given power by Ordinance No. 36 to authorise the temporary closing of public places for the purpose of allowing exhibitions, concerts, bazaars, etc., to be held there, and to permit moneys to be charged for admission thereto.

Railways.—The construction of the railway referred to in the notes to Ordinance No. 28 above has necessitated the passing of Ordinance No. 21 to regulate its construction and management. Under it the liability of the railway administration for loss or injury to animals or goods is confined to carriage within the Colony, the liability in respect of goods is confined to goods booked and paid for, lost or injured through the negligence or misconduct of the agents or servants of the railway, and the liability in respect of animals is limited to a certain amount varying with the nature of the animal. No responsibility is incurred for loss or injury in respect of passengers' luggage unless it has been delivered into the custody of a railway official. Moreover, in the case of articles of value (mentioned in the schedule) the responsibility of the carriers is limited unless their nature and value are truly declared.

Steam Boilers.—The use of steam boilers or prime movers without a certificate that they are in good condition is prohibited by Ordinance No. 32.

Stonecutters' Island Amendment.—The island of Hong-Kong is fortified and used exclusively by the military authorities as one of the harbour defences. Ordinance No. 17 prohibits the anchoring of vessels within 100 yards of the shore without authority.

Trade Marks.—Ordinance No. 40 consolidates the law relating to trade marks on the lines of the Trade Marks Act, 1905.³

Wireless Telegraphy.—Ordinances Nos. 4 and 42 prohibit the establishment without a licence of wireless telegraphy installations, and give the Governor power to make regulations for the use of such apparatus on merchant ships in the territorial waters of the Colony.

Criminal Law.—Sentence of death in the case of young persons is abolished by Ordinance No. 6 on the lines of s. 103 of the Children's Act, 1908.⁴

¹ 48 & 49 Vict. c. 69.

² See *Legislation of the Empire*, vol. iii. p. 96.

³ 5 Ed. VII. c. 15. See *Legislation of the Empire*, vol. i. p. 127.

⁴ 8 Ed. VII. c. 67, and see *Seychelles Legislation, infra*, p. 372.

OTHER ORDINANCES.

- 31. Appropriation.
- 37. Chinese Extradition (Amendment).
- 38. Christian Burial Ground.
- 20. Companies' Local Registers (Amendment).
- 25. Dogs (Amendment).
- 29. Executive Council : Relief of Duties.
- 41. Foreshores and Sea Bed New Territories Exemption.
- 2. Hungkom Bay Reclamation.
- 18. Interpretation (Further Amendment).
- 8. Life Insurance Companies.
- 46. Liquor Licences (Amendment).
- 23. Opium—An Ordinance to Amend and Consolidate the Laws Relating to Opium and its Compounds.
- 43. Order and Cleanliness (Amendment).
- 22. Patents (Amendment).
- 5. Postage Stamp Demonetisation.
- 16. Prepared Opium (Amendment) (repealed by No. 23).
- 13. Prison (Amendment).
- 15. Public Service : Transfer of Duties.
- 24. Rating (Amendment).
- 35. Recreation Grounds.
- 45. Squatters' (Amendment).
- 19. Stamp (Amendment).
- 44. Stamp (Further Amendment).
- 12. Supplementary Appropriation.

3. STRAITS SETTLEMENTS.

[Contributed by T. BATY, ESQ., D.C.L., LL.D.]

Enactments passed—24.

Companies (No. 14).—This is a retrospective act, enabling companies, when they subdivide their shares, to make the denomination of the new shares less than \$50.

Education (No. 16).—It is made incumbent on municipal commissioners to levy a 1 per cent. annual rate for educational purposes. Rural boards must do the same if requested by the "Government" (a phrase which may have a technical meaning which is not defined, but presumably means the Governor). The disposal of the money (subject to its being devoted solely to the purposes of education within the Colony) is practically left to a new body incorporated by the statute. It is the duty of this body to advise the

Government as to its expenditure and as to educational matters generally. Its composition includes the Singapore Director of Education, the heads of Government of Penang and Malacca, the Colonial Treasurer, two (annual) nominees of the Governor, and two (annual) nominees of the unofficial members of the Legislative Council.

Societies (No. 20).—To cope with Chinese secret societies a stringent Association Law was passed in 1889. This is now recast, and rendered still more sweeping, by the granting of powers to the Governor and Registrar to exact information at any time from societies which have been accorded exemption from the general scheme of the Act.

Post (No. 1).—In the Post Office Act of 1904, a section gives power to the postal officials to open a packet from abroad which is suspected to contravene the revenue law, or which the excise farmer desires to examine. This is now extended to packets (inland or foreign) suspected of containing any goods “in respect of which an offence is being committed,” or which the chief police officer, the opium-farmer, or the liquor-farmer wants to examine.

Crown Leases (Nos. 2, 11).—Lessees were found to be prevented from registering their documents of title under the statute of 1886 on account of the provision requiring the whole of the Crown rent due on the head lease to be first paid. Owing to sub-divisions, this was often impracticable. The present statute establishes a scheme for the apportionment of Crown rents. There appears to be no appeal from the decision of the Collector of Land Revenue as to the due appointment; but he is to consider objections carried in on notice. The Crown lessee is to be discharged, and the apportioned rent is made recoverable by Crown process against the sub-lessees.

Nuisance (No. 5).—The deposit of a dead or dying person in any public place, or in any private place without the consent of the owner, is made subject to a fine of \$250 and/or six months' imprisonment.

Labuan Assizes (No. 6).—The Straits Settlements having absorbed Labuan, by an Order-in-Council altering the boundaries,¹ it becomes necessary to provide for Supreme Court trial of cases from Labuan; and for this purpose to enable “assizes” to be held at Labuan, and to substitute two assessors for a jury in such cases, owing to the paucity of qualified jurymen. An assessor can only be challenged for favour or for “any other circumstance which in the opinion of the Court renders him improper as an assessor.” If one assessor stays away, the trial may go on without him. Crown counsel are accorded the right of reply, even in the case when no witnesses are called.

By a still more remarkable provision—which may be commended to the attention of students of constitutional law—an assessor who is acquainted with any relevant fact must inform the judge, and is thereupon to be sworn and examined like a witness. Each assessor is to give his “opinion” on the

¹ See Journal, N.S. vol. ix. p. 394.

case orally in open Court, and it is to be recorded. If the Court disagrees with both assessors, there will be a new trial with fresh ones. Certain persons are "liable" to serve as assessors, and the authorities are to make out a list of persons "qualified" to serve, which (as the qualifications are nowhere stated) appears to mean the same thing. Although certain classes of persons are "exempted," there seems no reason why, if included in the panel and not objecting, they should not serve as assessors. Assessors are paid: *per contra*, they can be fined the moderate sum of \$50 for non-attendance.

Fisheries (No. 9).—An Act of 1872 contained powers for the Governor to make rules generally for the regulation of the use of "fishing stakes," and this power was widely extended by an Act (21) of 1905¹ conferring on his Excellency very sweeping powers of legislation on fishery matters, *i.e.* prescribing and proscribing methods of fishing, and regulating the use of nets and other appliances (at any rate as regards their nature and the place of their employment). The present statute enables him to appoint fishery officers, and gives them powers of search and seizure. On the other hand, it deprives the Governor of the power of regulating angling and the use of the casting-net. The penalties of 1905 against using explosives to kill fish are extended to the use of poison; and in accordance with a fashion which has spread very much during the last year or two in the Colony, the fine and imprisonment are made cumulative. The stringent provisions for the protection of officials from actions which were contained in the Forests Act of 1908² are substantially repeated. It will be remembered that the short period of three months is prescribed as the limit of time for taking action, and malice and absence of reasonable or probable cause must be alleged and proved.

Prisons (No. 10).—In this statute the Colony takes power to act as jailer for the Malay States and Brunei.

Opium and Intoxicants.—By statutes Nos. 21, 22 the Straits Government takes power to abolish farmers and openly to embark in the opium trade, instead of farming it. It remains, of course, a monopoly. The statute can come into play as and where directed by Order-in-Council. Few substantial variations in the law appear to be made, but among the details it may be noticed that "steam vessel" includes vessels propelled by electricity.

Miscellaneous Acts include measures dealing with *Tamil Immigration* (No. 3), *Marriage* (Nos. 7, 17), *Civil Law Consolidation* (No. 8), *Civil Procedure* (No. 12), *Petroleum* (No. 18), *Registration of Deeds* (No. 23), and a few correcting clerical errors in recent enactments.

¹ See *Legislation of the Empire*, vol. iii, p. 129.

² No. 22 of 1908. See *Journal*, N.S. vol. x, p. 321.

4. FEDERATED MALAY STATES.

In 1909 a Federal Council was created by an agreement between the High Commissioner and the four native rulers. Its establishment had been decided upon in principle in 1907, but the arrangement of details occupied some considerable time, so that the formal Act was not signed until October 1909. "The State Councils will continue to enact measures of a purely local nature, and exercise the same authority as formerly in matters of local government, while the Federal Council deals with all measures of general application, with the annual estimates of revenue and expenditure, and with such other business as is usually dealt with by the Legislative Council in a Crown Colony."¹ The Council consists of the rulers of the four States, the High Commissioner, the Resident-General, the four British Residents and four unofficial members, nominated by the High Commissioner with the approval of the Crown. It met for the first time on December 11, 1909.

(i) FEDERAL COUNCIL.

Enactments passed—6.

Banishment.—The first Enactment makes one uniform law relating to banishment and repeals the State enactments on the subject. Upon written information the Resident may submit to the ruler of any State that there is reasonable cause for believing that the banishment from the State of a particular person is necessary for the safety, peace, or welfare of the State or of any other of the Malay States, or that a person is in control of any unlawful society in the Colonies of Hong Kong or the Straits Settlements. Upon being satisfied as to the Resident's information the ruler may order the person's expulsion or require him to find sureties to be of good behaviour. The ruler having made the order the person is taken before the Resident in order that he may deliver the sentence and inform him of the duration of his banishment. Any person endeavouring to return is subject to summary arrest and shipment from the Colony or rigorous imprisonment. Harboursing a banished person is also punishable unless the offender be a husband or wife.

Interpretation Statute.—No. 2 amends the law relating to the shortening of the language used in Enactments and other written laws.

Finance.—No. 3 makes provision for the common fund of the four States. The total amount is \$26,985,393.

Chandu.—No. 4 vests in the Government the sole right of importing chandu into the coastal areas of the Federated Malay States and gives power to regulate its disposal and sale. Chandu is defined to mean "any

¹ See Report of the Acting Resident-General presented to Parliament, Cd. 5373.

preparation of opium or any preparation in which opium forms an ingredient, which preparation is used or intended to be used for smoking, chewing, or swallowing, and includes chandu dross, but does not include any of the alkaloids or salts of the alkaloids of opium." The Enactment is amended by No. 6.

Rubber.—The object of No. 5 is to control dealings in cultivated rubber, which includes "the leaves, bark, latex, and any other produce of any plant or tree on alienated land yielding rubber or gutta percha in any form." Its purchase, treatment, or storage is prohibited except under licence. Among the regulations for the grant of the licence is the provision that it may be refused "to any person who is the agent of or is under any obligation or agreement to act for any individual, corporation, or combination which he [the licensing officer] is satisfied is attempting or about to attempt to secure control of the output of, or the market for, any cultivated rubber." A licence may be cancelled for the same reason. The appeal allowed to the Resident under other sections of the Ordinance does not extend to these two provisions. Every person engaged in the cultivation of rubber must give notice to the officer in charge of the land office of the district and furnish information with respect to the area and number of trees.

(ii) LEGISLATION OF THE COUNCILS OF THE FOUR STATES.

[Contributed by T. BATY, Esq., D.C.L., LL.D.]

The legislation of PERAK dealt with *Land, Mining, Registration of Title, Waterworks, Truck, Jinrikshas, Criminal Law, Dangerous Trades, Drainage, Tamil Immigration, Motor Cars, Dogs, Exile, Government Loans, Netherland Indian Coolies, and Courts*. SELANGOR followed suit, and added enactments as to *Railways and Intoxicants* and one or two private Acts, but did not deal with *Criminal Law*, as the Perak enactment merely confirmed the Perak statute of 1903, adopting the Straits Penal Code.

It has been observed¹ that the wholesale adoption by a State, which is technically foreign, of the Straits Criminal Laws, "as if they had been expressly enacted within" Perak, is liable to cause great confusion. The words "*mutatis mutandis*" are not used: and what will the result be as to the law of treason? Also, if the Straits Code penalised certain dealings with Government property, will Straits Government property, or Perak Government property, or both, be understood to be included, in Perak? Perak goes so far as to adopt prospectively all future amendments of the Criminal Code by the Legislature of the Straits. Presumably amendments expressly referring to that Code are alone meant.

In NEGRI SEMBILAN, the same subjects were dealt with as in Selangor; in addition, *Customary Tenure* was the subject of legislation. This

¹ See Journal, N.S. vol. vii. p. 438, and vol. vi. p. 345.

appears to make the alienation of "customary" land impossible without the consent of the village chief or the Government: nor can it be taken in execution by any one out of the tribe—or at any rate the members of the tribe and allied tribes have a right of paying off the execution creditor. If "customary" land is alienated out of the allied tribes, it ceases to be subject to the customs.

PAHANG followed the other four Legislatures at some little distance, and adopted in 1909 the same statutes as Negri Sembilan, except as to Customary Tenure. It also adopted the Straits *Criminal Law* in the inelegant and illogical manner usual in the other territories; and was obliged to pass a retrospective law validating *Patents* granted under a statute which had never been made executory by the issue of the due proclamation. Further, it dealt with *Pawnbroking* and *Reformatory Schools*, subjects which had already been provided for in the rest of the peninsula; and it relieved its ruler "on the ground of advancing years" from the burden of public affairs by transferring "all powers and functions" to his son.

5. MAURITIUS.

[*Contributed by the Procureur-General, A. HERCHENRODER, ESQ.*]

Ordinances passed—35.

Licences.—Ordinance No. 1 raises a licence duty of Rs. 5 on cycles as defined by Art. 1 of the Ordinance, and increases the tax on motor-cars from Rs. 22 to Rs. 60 per annum.

No. 2 permits licensed hawkers and sellers of vegetables and fruits to hawk and sell the same, whether in the green or dry state, provided they are grown in the Colony.

Minors' Property.—By No. 3 the Supreme Court is given power to order the erasure of an inscription of the minor's legal mortgage burdening an immovable property which it may be in the interests of all concerned to sell.

Defaced Coins.—No. 4 adapts to the Colony the relevant provisions of the Indian Coinage Act, 1906.¹ The measure originated in the attention of the Government being called in 1907 by the two local banks to the large number of soldered rupee coins in circulation.

Licences (Municipal).—No. 6 reduces the municipal licence paid by owners of plying boats from Rs. 48 to Rs. 36 per annum.

Telephones.—No. 8 amends the Telephone Ordinance, 1907,² so as to empower the Governor in Executive Council, when granting a licence to any undertaker under that Ordinance, to fix in such licence a period during

¹ No. 3 of 1906. See *Legislation of the Empire*, vol. iii. p. 24.

² No. 19 of 1907. See *Legislation of the Empire*, vol. iii. p. 165.

which the Government may not purchase any telephone erected under the licence; it also allows the undertaker one year's notice prior to intended purchase.

Royal Commission.—By Ordinance No. 9 full powers were given to the Royal Commissioners appointed by His Majesty the King to inquire into the conditions and resources of the Colony. The Ordinance was drafted on the lines of the Commissioners (Examination of Witnesses) Ordinance, No. 19 of 1897.

Railways.—An amending Ordinance (No. 12) gives statutory authority to one of the conditions, in the Railway Bye-laws, attached to the permission of travelling in goods brake-vans, viz. that the Railway Department shall not be responsible for any accident or delays, or from any injuries or loss arising therefrom.

Children and Young Persons (Abolition of Death Sentence).—Ordinance No. 13 places on the Statute Book a measure borrowed from s. 103 of the Children's Act, 1908,¹ providing for the abolition of death sentence in the case of children and young persons: the age limit is that fixed by the Imperial enactment.²

Reward Funds.—A Consolidating Ordinance (No. 16) brings together the following several funds locally known as Reward Funds: (*a*) the Police Reward Fund; (*b*) the Forest Reward Fund; (*c*) the Inland Revenue Reward Fund; (*d*) the Post Office Reward Fund; (*e*) the Railway Reward Fund; (*f*) the Customs Reward Fund.

By Art. 7 the Governor is empowered generally to grant a reward or gratuity out of any fund under the Ordinance to the widow or children of any officer to whom the fund applies—in special circumstances, and if this can be done without unduly depleting the fund.

Electric Light and Power.—An Amending Ordinance (No. 17) gives (*a*) powers of control to the Director of Public Works and Surveys over the technical nature of any intended electrical undertaking and works connected with the same; (*b*) enables "pressure" to be defined by regulation; (*c*) extends the powers of appeal to the Governor in Executive Council; and (*d*) authorises any undertaker to control and inspect within reasonable bounds the installation of any consumer.

Magistrates.—The Bench Jurisdiction (Extension) Ordinance (No. 18) places within the jurisdiction of the Bench of Magistrates offences under Arts. 122 and 123, par. 2, of the Penal Code (embezzlement committed by public depositaries and accountants, and by agents, clerks, or servants of the Government or of public depositaries) and under Art. 249, par. 2 (indecent assault), which were hitherto within the exclusive jurisdiction of the Assize Court with a jury, no matter the comparative unimportance of the case.

Widows' and Orphans' Pension Fund.—An amending Ordinance (No. 19)

¹ 8 Ed. VII. c. 67.

² See Seychelles Legislation, *infra*, p. 372.

has for its main object the adoption of certain provisions favourable to associates of the Fund continued in the Perak Enactment No. 2 of 1908.

Post Office.—An amending Ordinance (No. 20) reduces the sea-postage payable to masters of non-mail vessels from 4 to 2 cents of a rupee for every letter sent by such vessel.

Quarantine.—An amending Ordinance (No. 23) improves the definition of “healthy vessel” under the quarantine laws of the Colony so as to allow any ship producing evidence that she has worked in quarantine at any infected port to be admitted to pratique on her arrival in the Colony, whether she has taken cargo or not at that port, provided that she otherwise comes within the definition of a healthy vessel.

Customs Tariff.—An amendment of the Tariff by Ordinance No. 26 alters the duty leviable on matches and exempts books and music generally from payment of duty.

Harbour Dues.—An amending Ordinance (No. 28) reduces the anchorage dues to R. 0.08 per ton register instead of R. 0.23 in the case of steamers entering the harbour for the exclusive purpose of coaling, with a proviso charging an additional due of R. 0.05 per ton register for every subsequent twelve hours’ or part of twelve hours’ daylight over and above a period of twenty-four hours, up to the maximum charge of 23 cents of a rupee provided by the main enactment.

Penal Code.—The object of Ordinance No. 29 is to correct certain clerical errors in Ordinance No. 22 of 1901,¹ and at the same time to introduce into the Colony the principles of the English law on seditious libel. It also adds a provision against the compounding of offences on the lines of that existing in the Indian Penal Code.

Criminal Evidence.—Ordinance No. 30 introduces into the Colony the provisions of the Criminal Evidence Act, 1898.²

Bankruptcy.—Arts. 1, 4, 5, and 6 of an amending Ordinance (No. 32) make agents of firms carrying on business in Mauritius on behalf of principals residing out of Mauritius criminally responsible for their own acts where such acts in the case of a principal would be declared as fraudulent by the Bankruptcy Law.

Arts. 2 and 3 reproduce provisions of the principal Bankruptcy Ordinance with an addition to the definition of the word “debtor” similar to that which was made to the corresponding section of the principal Bankruptcy Ordinance of Hong Kong by s. 3 of the Hong Kong Ordinance No. 6 of 1902.³

Art. 7 amends par. iii. of Art. 49 of the Bankruptcy Ordinance,

¹ See *Legislation of the Empire*, vol. iii. p. 150.

² 61 & 62 Vict. c. 36. See *Legislation of the Empire*, vol. i. p. 17.

³ This additional definition of the word “debtor” has for its object to meet the decision of the House of Lords in the case of *Cooke v. The Charles A. Vogeler Company*, (1901) A.C. 102.

1887, which defines that part of the bankrupt's property which shall not be divisible among his creditors, with a view to restrict the application of the paragraph to property which has been obtained within one month prior to the petition.

Art. 9 extends the powers of seizure under Art. 62 of the main Ordinance to the property of a "debtor," as well as of a "bankrupt," within the meaning of the enactment.

Art. 10 simplifies the procedure in the case of a reference of the parties by the Judge of Bankruptcy to the Supreme Court.

Art. 11 fixes the amount of small bankruptcies at Rs. 5,000 for purposes of summary procedure.

By Art. 12 power is taken to reach criminally principals or agents of principals who sell away at ridiculously low prices their stock-in-trade on the eve of bankruptcy, with intent to defraud their creditors: the same provision *qua* agents, appears as par. xviii. of Art. 4.

Art. 13 empowers all magistrates (irrespective of the district assigned to them) to order a provisional seizure of the goods of any trader suspected of an intent to remove the same in fraud of the rights of his creditors.

Art. 14 simplifies the procedure in the case of prosecutions in minor cases under the Bankruptcy Ordinance and adds such cases to the jurisdiction of District Magistrates.

Art. 15 determines the value of the stamp to be affixed on bankruptcy petitions.

Aliens.—The Banishment Ordinance (No. 34) has for its object to make regulations for the expulsion of aliens, borrowed from the Straits Settlements Banishment Ordinance No. IV. of 1888, XVII. of 1899, VII. of 1906, and VII. of 1907, and from ss. 3 and 4 of the Aliens Act, 1905.¹

Minors' and Interdicted Persons' Personal Property.—Ordinance No. 35 completes such of the provisions of the Civil Code for the protection of the property of minors in the sense of the French law of February 27 and 28, 1880, which regulates the powers of alienation by the guardian, of incorporeal chattels or rights belonging to a minor or an interdicted person.

6. SEYCHELLES.²

Ordinances passed—14.

Leprosy.—Ordinance No. 1 renders the notification of leprosy compulsory, and establishes a procedure for the care and treatment of lepers similar to that in force regarding lunatics. The next-of-kin of the leper may enter into

¹ 5 Ed. VII. c. 13.

² Based upon the Annual Report (Cd. 4964-17) presented to Parliament.

a bond for his proper maintenance and for the carrying out of such precautions as the Chief Medical Officer may prescribe. If the next-of-kin are unable or unwilling to make adequate provision for the patient, he may be committed, by order of the Chief Justice, to the Government Asylum, where he is to be treated as a pauper or paying patient according to the means of his "next-of-kin."

Midwives.—Ordinance No. 2 compels every certificated midwife to come up for re-examination by the medical examiner every two years.

Juvenile Offenders.—Ordinance No. 4, which was introduced on instructions from the Secretary of State, provides that sentence of death shall not be pronounced or recorded against any person under the age of sixteen. It corresponds with s. 103 of the Children's Act, 1908.

Labour.—The main Ordinance (No. 5) and No. 41, which amends it in certain details, deal with labour on outlying islands and form a complete labour code for this important part of the Colony.

The previous code, Ordinance No. 6 of 1902, with its amending Ordinance, is repealed and replaced by a law meeting the present requirements. Virtually, the verbal contract is abolished, as all contracts whether written or verbal have to be entered into before the Crown Prosecutor. This provides a great safeguard for both master and man, and reduces to a minimum the possibility of litigation as to the terms of agreement. The very serious abuse of labourers taking advances and then refusing or neglecting to proceed in the vessel provided to convey them to the islands is met by a simple but effective procedure, similar to that adopted in merchant shipping. The master makes complaint to the police, who forthwith arrest the deserter, for such he is, and convey him on board the vessel after giving warning that he has a right to be taken before the stipendiary magistrate to state his case. If he elects to state his case in court and the magistrate finds that his appeal is based on frivolous grounds, the magistrate has the power to order that the deserter shall pay the costs incurred by the master. For the better preservation of discipline, the manager of an island is given limited powers of imprisonment or in lieu thereof of inflicting a fine not exceeding one day's pay for a first offence and Rs. 5 for a subsequent offence. The power of imprisonment was given under the previous Ordinance, but the owners of islands specially asked that the fine should be added as an alternative. All penalties are subject to review by the visiting magistrate, from whom an appeal also lies. No cases of abuse of the powers entrusted to managers in this respect have come to light. In other respects the new code differs but slightly from the former law.

Notification of Diseases.—Ordinance No. 6 adds tuberculosis, chicken pox, whooping cough, and jiggers (chingoe) to the list of diseases the occurrence of which has to be notified to the medical authorities.

Native Labour.—Ordinance No. 7 prohibits the recruiting of labour for places outside the Colony, except under licence approved by the Governor.

It provides for the payment of repatriation expenses by persons so recruiting labourers.

Restriction of Royal Titles in Trade.—Ordinance No. 9 prohibits the use of prefixes suggesting Royal or Government patronage in connection with the name of a trading company.

IV. AUSTRALASIA.

I. COMMONWEALTH OF AUSTRALIA.

[*Contributed by* HERMAN COHEN, ESQ.]

Public Acts passed—29.

The bulk of the legislation is, as usual, Supply and Appropriation Acts. Many Acts are merely amending Acts passing a multitude of details, no doubt found necessary by experience of the working of the respective principal Acts ; they do not, as a rule, embody any new principle ; (the Government wisely prints in each case the principal Act as amended by each successive Act). Amending Acts in 1909 were the Australian Industries Preservation Act (1906-1909), the Commonwealth Electoral Act (1902-1909), the Defence Act (1903-1909), the Invalid and Old Age Pensions Act (1908-1909), the Patents Act (1903-1909), and the Referendum (Constitution Alteration) Act (1906-1909).

Coinage.—By Act No. 6 British and Australian coins of current weight are recognised and the amounts of legal tender is the same as in England. What coin is or is not “of current weight” is determined by the rule of its own country—*i.e.* either that of the United Kingdom or of Australia (where, apparently, the figures are settled by proclamation).

Telegraph.—Act No. 9 gives the Governor-General power in any “emergency”—*i.e.* when there is anything “in the nature of war or danger of war”—to assume control of cables and wireless telegraphs.

Marine Insurance.—Act No. 11 is a reproduction of the English Marine Insurance Act, 1906,¹ with slight modifications in the arrangement, notably the placing of the definition section at the beginning instead of the end. The Act applies to “marine insurance other than State marine insurance and to State marine insurance extending beyond the limits of the State concerned.”

Finance.—The Surplus Revenue Act (No. 18) deals with purely internal details of Commonwealth finance.

Elections.—The Commonwealth Electoral Act (No. 19) legalises voting by post and makes many provisions for the purpose. Voters who do not expect to be within five miles of a polling place of their division on the election day, or being women will “on account of ill health” be unable to

¹ 6 Ed. VII. c. 41.

attend, or, generally, voters who will be prevented "by serious illness or infirmity" from polling, may vote through the post.

High Commissioner.—Act No. 22 empowers the Governor-General to appoint a High Commissioner in the United Kingdom, his salary to be £3,000 per annum; he must not be connected with any company or syndicate.

Monopolies.—The Australian Industries' Preservation Act (No. 26) strikes again (being an amending Act) at the repression of monopolies by penalising exclusive dealing and improper refusals to sell.

Bills of Exchange.—Act No. 27 embodies a uniform law for the whole of the Commonwealth in the form, *mutatis mutandis*, of the English Act¹ and repeals the whole of the State legislation on the subject. S. 65 (2) is an addition to s. 60 of the English Act in the following terms:² "An order on demand, drawn by or on behalf of a banker at one place of business on and payable by the banker either at the same or at some other place of business, shall, for the purpose of the protection of the banker under this section, be deemed to be a bill payable to order on demand." Ss. 85, 86 differ slightly from the corresponding sections of the English Act, and s. 88 incorporates the Crossed Cheques Act, 1906.³

Labour Disputes.—The Commonwealth Conciliation and Arbitration Act (No. 28) protects employees and masters from detriment—*e.g.* dismissal or discontinuance of contract—by each other merely by reason that either is a member of an organisation or "is entitled to the benefit of an industrial agreement or award."

Seamen's Compensation.—Act No. 29 is on the well-known lines of the Workmen's Compensation Acts adapted to the particular calling in question.

2. NEW SOUTH WALES.

[Contributed by NORMAN BENTWICH, ESQ.]

Public Acts passed—28.

Supply.—Nos. 1, 4, 16, 17.

Inebriates.—No. 2 amends the principal Act of 1900⁴ in a number of particulars. An inebriate may be placed under charge of a guardian who shall (a) prescribe for him a place of residence either in his own house or in the patient's house; (b) provide medical attendance; (c) may deprive him of intoxicating liquor and drugs; (d) prevent him from leaving his residence; (e) may warn persons from supplying him with intoxicating liquors or

¹ 45 & 46 Vict. c. 61.

² Cf. note to that section in Chalmers's *Bills of Exchange Act*.

³ 6 Ed. VII. c. 16. See *Legislation of the Empire*, vol. i. p. 131.

⁴ No. 32 of 1900. See *Legislation of the Empire*, vol. i. p. 459.

narcotic drugs. Any person so warned in writing who disregards the warning is liable to a penalty not exceeding £20 (s. 3).

The Governor may establish institutions for the reception and treatment of inebriates which shall be under the control of the Inspector-General of the Insane; and a penalty is imposed upon anybody interfering without lawful authority with such an institution or its inmates (s. 4).

When an inebriate is convicted of certain offences the Court may (a) either discharge him on his entering into recognisances not to take any intoxicating liquor, and to report himself every three months to the principal officer of police; or (b) may order him to be placed for a period of twelve months in a State institution, which period may be extended from time to time on the order of a judge or a master in lunacy. The Governor may release on licence any person detained in a State institution, and may revoke such licence, which may also be revoked by a justice summarily on proof that the licensee has been guilty of breach of any condition contained in it (s. 5).

Motor Traffic.—No. 5 empowers the Governor to make regulations for the use of motor vehicles in a number of ways. Part III. makes it an offence to drive a motor vehicle upon a public street negligently, furiously, or recklessly, or at a speed dangerous to the public; and in considering whether an offence has been committed the Court shall have regard to all the circumstances of the case, including the nature, condition, and use of the street, and to the amount of the traffic which actually is at the time and which might reasonably be expected to be upon the street. Notice of the intended prosecution must be given or sent to the person charged or to the owner of the car within such time after the offence is committed, not exceeding fourteen days, as the Court thinks reasonable. The penalty for an offence is a fine not exceeding £20 and the suspension of the licence (Part III.).

When an information is laid by a person other than a member of the police force, and the proceedings are dismissed or withdrawn, the Court may order that the said person pay to the defendant, in addition to any costs, such compensation for loss of time as seems reasonable (s. 15).

Forestry.—No. 6 empowers the Governor to purchase, resume, or appropriate land for the purpose of a State Forest. Within three years of the commencement of the Act, or so soon as practicable, the Minister shall cause a classification of the forest lands of the State to be made for the purpose of determining which are suitable to be (a) permanently dedicated as State forests, (b) temporarily reserved as timber reserves. Timber-getters' and other licences, to have effect for a year or any less term not less than a month, may be granted by the Minister (s. 14).

After open inquiry and report by the local Land Board the Minister may, when land is difficult of access, or the getting of timber would entail heavy expenditure, grant exclusive rights to take timber; but such rights shall not be granted in respect of an area exceeding 10,000 acres or for a period exceeding fifteen years (s. 15).

Fixed conditions are to be attached to such an exclusive right, including the obligation of the holder to furnish a monthly return, giving the particulars of the number of logs and superficial contents of timber removed from the land (s. 16).

Provision is also made for the granting of saw-mill licences, for permits to graze and to occupy State lands, for the royalty to be paid on timber felled or removed from the State forests and reserves, and for the regulation of ring-barking trees (ss. 18-21).

Generally it is provided that licences and permits under the Act are not to be transferable without the consent in writing of the Minister; and where practicable the Minister is to impose conditions for afforestation and re-afforestation in all exclusive rights or licences (ss. 23-24).

Fire Brigades (No. 7).—This statute consolidates and amends the law relating to the extinguishing of fires, constitutes a Fire Brigades Board, and contains numerous provisions defining the powers and duties of the Board. The Board is to be a body corporate consisting of a President appointed by the Governor and four members, of whom two are elected by the councils of certain municipalities in the State, who shall hold office for three years but may be re-elected. The votes of the councils of the municipalities are to be proportionate to the amount of their contribution to the fund administered by the Board. The other two members are to be elected by the insurance companies and the volunteer fire brigades respectively, and will hold office upon the same terms.

The President of the Board is to receive a salary of £300 from the Consolidated Revenue Fund and the members such fees from the fund, not exceeding in the aggregate £600 for any year, as may be prescribed by by-laws (ss. 7-12).

The Board is to establish and maintain permanent fire brigades and pay subsidies to volunteer fire brigades. It may recover charges for attending any fire, and it is each year to make an estimate of the expenditure required in each fire-district, provided that the amount estimated to be required as a contribution from each district shall not exceed one farthing in the pound on the unimproved capital value of ratable land in the district. The amount of the contribution shall be paid in equal thirds by the municipality or shire, by insurance companies, and by the Colonial Treasurer. The insurance companies and owners of property are to send in annually to the Board a return of the amount received and paid respectively by way of fire premiums (ss. 34-40).

Seat of Government: Surrender.—No. 14. provides for the surrender by the State to the Commonwealth of the territory which is required for the purposes of the seat of Government of the Commonwealth, consisting of an area of about 500 square miles in the counties of Murray and Cowley.

Closer Settlement (No. 14).—This Act amends the principal Act upon the

subject of 1904,¹ and entitles any male person over eighteen years of age, and any female over twenty-one, to apply for a settlement purchase under certain conditions. Numerous other detailed changes are made in the regulations governing land set apart for closer settlement; and as regards costs of proceedings by way of appeal for determining the value of land resumed, it is provided that (a) when the value determined by the Court is equal to or less than the amount at which the Government has offered to purchase the land, the owner shall pay the costs of the appeal; (b) when the value is equal to or greater than the amount which the owner claims, the Crown shall pay the costs; (c) when the value is between the two amounts, a most elaborate system is set up for fixing the proportion of the owner's taxed costs that the Crown is to pay.

Defamation Amendment (No. 22).—It is provided by this Act that it shall not be necessary to set out in any information, indictment, or criminal proceeding against the publisher of any obscene or blasphemous libel the obscene or blasphemous passages, but it shall be sufficient to deposit the book or newspaper or other document with the information, etc., together with particulars defining the objectionable passages (s. 3).

No criminal prosecution shall be commenced for libel without the order of a judge of the Supreme Court or of a District Court. Such application shall be made on motion to the person accused, who shall have an opportunity of being heard against it (s. 4).

S. 5 specifies a number of matters of public interest for the publication of which no criminal or civil action for libel shall lie if made in good faith for the information of the public. The publication may be deemed to be privileged though made in pursuance of a contract for valuable consideration (ss. 5 and 6).

The defendant may give in evidence in mitigation of damages that the plaintiff has recovered compensation in other actions for libel to the same purport or effect (s. 7).

If upon the hearing of a criminal proceeding for libel the Court (*i.e.* a stipendiary or police magistrate) is of opinion that the libel was trivial, it may, where the defendant consents, deal with the case summarily and impose a fine not exceeding £50 (s. 9).

The proprietor of a newspaper may be compelled by a judge of the Supreme Court to supply to the person aggrieved the name and address of the writer of an article or letter which he has published (s. 11).

Justices (No. 24).—The Act makes further provision for the appointment of stipendiary and police magistrates and also amends certain statutes dealing with their powers and jurisdiction. It enables (*inter alia*) the Minister to appoint any person to act as a stipendiary for a time not exceeding fourteen days while the magistrate is absent from his duties.

Aborigines' Protection.—No. 25 creates a Board to consist of the

¹ No. 37 of 1904. See *Legislation of the Empire*, vol. i. p. 485.

Inspector-General of Police as chairman, and not more than ten other members to be appointed by the Governor, for the protection and care of aborigines. The Board may appoint local committees to act in conjunction with it and local guardians of aborigines. The duties of the Board are (a) to distribute and apply moneys voted by Parliament for the relief of aborigines; (b) to distribute blankets and clothing; (c) to provide for the custody and education of their children; (d) to manage and regulate the use of reserves. Power is given to apprentice female and infant natives and to remove natives camped in the vicinity of townships. It is made an offence to give or sell liquor to any native except on the prescription of a medical practitioner, and for any person not being an aborigine to wander with any native, without being able to show that he has a fixed place of residence and lawful means of support, and that he wandered for some temporary and lawful occasion only.

Industrial Disputes.—No. 26 amends the principal Act of 1908,¹ and adds to the list of “necessary commodities” in respect of which strikes are forbidden coal, gas, water for domestic purposes, and any article of food the deprivation of which may tend to endanger human life and cause serious bodily injury (s. 2).

It declares unlawful a meeting of two or more persons assembled for the purpose of instigating to or aiding in a strike or lock-out or managing or aiding in the continuance of a lock-out or strike already in existence, when such lock-out or strike is in respect of a necessary commodity or of the transport services of the State in relation thereto. Any person who takes part in such a meeting, and who has reasonable grounds to believe that the probable consequences of a continuance of the strike or lock-out will be to deprive the public either wholly or to a great extent of the supply of a necessary commodity, is liable to imprisonment for twelve months.

Any person who as principal or agent enters into a contract or engages in any combination with intent to restrain the trade of the State in any necessary commodity to the detriment of the public, is liable to a penalty not exceeding £500, and the same penalty is imposed on any person who monopolises or combines with any person to monopolise any part of the trade of the State with the same intent (s. 4).

Dentists (No. 27).—This Act amends the Act of 1900² and creates a Dental Board consisting of eight members—two qualified medical practitioners and four registered dentists to be appointed by the Governor every three years, and the head of the faculty of dentistry in the University of Sydney and the President of the United Dental Hospital of Sydney, *ex officio*.

On the recommendation of the Board, the Governor may make regulation for the control of the profession.

¹ No. 3 of 1908. See Journal, N.S. vol. x. p. 327.

² No. 45 of 1900. See *Legislation of the Empire*, vol. i. p. 461.

Factories and Shops (No. 28).—This is another amending Act amplifying the principal Act of 1896 in a number of particulars. A penalty not exceeding £10 is imposed upon any person occupying an unregistered factory; an inspector may notify the occupier of any factory that it is unfit for such a purpose, and specify the requirements which he deems necessary to render it fit. An appeal from the notice of the inspector is allowed to the Minister. In certain cases dressing-rooms for women employees and special means of escape from fire must be provided; and the employment of women and young persons may be altogether prohibited by the Minister in connection with machinery which is regarded as dangerous. The occupier of a factory is to keep a record each week of the occasions on which he works overtime, and he must if required prove that such overtime working was done *bona fide* to meet the exigencies of trade; when he fails to satisfy the Minister accordingly three times within any twelve months, he shall not thereafter be entitled at any time to avail himself of the right of working overtime (s. 14).

In a factory where any Chinese work or where any person is employed in manufacturing articles of furniture, no person shall work before 7.30 in the morning or after 6 o'clock in the evening, or on Saturday after one in the afternoon or on Sunday at all (s. 16).

Finally, power is given to the Governor to make a number of additional regulations in respect of factories and shops.

3. QUEENSLAND.

[Contributed by W. F. CRAIES, ESQ.]

Acts passed—21.

Constitution.—9 Ed. VII. No. 18, amends the Constitution Act Amendment Act of 1896,¹ and provides as to members of the existing and future legislatures (a) that one member of the Legislative Assembly who is for the time being recognised as leader of the Opposition is and shall be entitled to £500 instead of £300 a year, in addition to the allowances granted by s. 4 of the Act of 1896 for mileage and passage money; (b) that the allowances to a member of Parliament shall be payable "from the day appointed in the writ [of election] as the day for taking the poll for his election until the day appointed in the writ for taking the poll for the election of his successor, and for that purpose he shall be deemed to be a member notwithstanding that Parliament has been dissolved."² Where a vacancy is caused otherwise than by a dissolution his allowance runs only till the

¹ 60 Vict. No. 5.

² Under the Act of 1896 the allowance ran "from the day on which the writ of election is returnable until he ceases to be a member."

member ceases to be a member, and his successor's allowance runs from the day appointed by the writ for taking the poll for *his* election.

Rabbit Boards.—The Rabbit Boards Acts, 1896 to 1905,¹ which had been continued by various Acts until the end of the session of 1909, expired on August 30, 1909. By 9 Ed. VII. No. 9, they were revived as from that date, and with amendments continued to December 31, 1910.²

Railways.—9 Ed. VII. No. 19, fixes the annual salary of the Commissioner of Railways at £2,250 per annum, charged on the Consolidated Fund.³

Justices of the Peace.—9 Ed. VII. No. 11, amends the Justices Act, 1886. It provides (1) that in certain districts and for certain purposes a police magistrate if present shall alone constitute a Court; (2) for ordering imprisonment in default of sufficient distress in the case of decisions awarding a pecuniary penalty or compensation or sum of money or costs; (3) for payment of instalments on account of sums adjudged by an order or decision and reduction of any term of imprisonment proportionally to the amount paid; ⁴ and (4) for postponing the issue of warrants of commitment in lieu of sufficient distress.

Ecclesiastical Property.—The Presbyterian Church of Queensland was incorporated by Letters Patent issued in 1876 under the Religious and Charitable Institutions Act of 1861 (No. 19). 9 Ed. VII. No. 7, provides machinery for vesting in this corporation real or leasehold property now or hereafter held by any person in trust for the Church or for any congregation thereof or for any purpose in connection with the Church or any congregation thereof. The General Assembly of the Church is empowered by resolution to apply the Act to particular property coming within the scope of the Act, with the consent of the congregation affected. On evidence that the necessary resolutions have been passed the property is to be entered in the land register as vested in the corporation.

Companies.—9 Ed. VII. No. 13, amends the Queensland Companies Acts, 1863 to 1896, as to mortgages by incorporating provisions adapted from ss. 93-107 and 212 of the Imperial Companies Consolidation Act, 1908, and as to defunct companies by an adaptation of s. 242 of that Act.

It enacts a new scale of fees for registration of companies and company documents, which applies also to British and foreign companies (s. 23); and extends the provisions of the State laws as to notice of increase of capital to all companies including British and foreign companies (s. 22). Provision is made for the grant of licences to hold land to registered foreign companies and for their winding up so far as they carry on operations in Queensland (s. 24); and for winding up estates which comprise shares not fully paid up in a company (s. 25).

¹ See Journal, O.S. vol. ii. p. 177, N.S. vol. vii. p. 438.

² S. 53 (2) of the Act of 1896 and s. 2 of the Act of 1903 are repealed: 9 Ed. VII. No. 9, s. 2 (2).

³ The Act seems to be limited in operation to the existing holder of the office.

⁴ Cf. the Summary Jurisdiction (England) Act, 1879 (42 & 43 Vict. c. 49), ss. 7, 21.

Mines.—9 Ed. VII. No. 15, regulates mining on private land. By s. 6 the following rules are made as to property in minerals:

(1) Gold below the surface of all land in fee simple in Queensland, whether alienated in fee simple or not so alienated from the Crown, and if so alienated whensoever alienated, is the property of the Crown.

(2) The same rule is applied to silver unless it is under land alienated in pursuance of certain specified enactments.

(3) Copper, tin, opal, or antimony on or below the surface of all land within the limits of a goldfield or mineral field are the property of the Crown if under land not alienated in fee simple from the Crown on, or alienated or contracted to be alienated in fee simple from the Crown since March 1, 1899.

(4) Coal on or below the surface of land subject to the Agricultural Lands Purchase Act of 1901¹ is the property of the Crown whether the lands have or have not been alienated in fee simple from the Crown by March 1, 1910.

(5) All other minerals are the property of the Crown which are on or under land not alienated in fee simple from the Crown by March 1, 1910.

All Crown grants and leases (under any Act relating to Crown land) issued on or after March 1, 1910, must contain a reservation of all gold and minerals on or under the land and of the right of access to search for and work mines of gold and minerals on any part of the land.

Power is given to exempt wholly for a time private lands in a district or specified portions of private lands. The Crown may resume lands for mining and grant mining tenements comprising private lands, with the exception of certain specified classes of private land. The owner of the land may acquire a mining tenement thereon. No person may enter or remain on private land for mining unless a mining tenement has been registered or a permit has been issued by the Warden.

The grant of a mining tenement gives the grantee a right to enter and mine subject to compensation fixed on a scale and in manner provided by the Act.

Workers' Compensation.—The Workers' Compensation Act, 9 Ed. VII. No. 16, extends the provisions of the Act of 1905² to cases of disablement for three days and upwards. Under the earlier Act the period was "two weeks."

Workers' Dwellings.—9 Ed. VII. No. 10,³ enables the State to assist persons in receipt of small incomes to provide homes for themselves. The applicant must not have more than £200 a year, must be freeholder or possessor of land of a specified character, and must not be owner of a dwelling-house in Queensland or elsewhere. The Government

¹ See *Legislation of the Empire*, vol. i. p. 517.

² See *Journal*, N.S. vol. vii. p. 440.

³ Cf. the Act (62 & 63 Vict. c. 44) for the United Kingdom.

is authorised to raise £250,000 by debentures, and to advance to the applicant a sum not exceeding £300 nor two-thirds of the fair estimated value of the site and the proposed dwelling-house. The advance is by first mortgage repayable by instalments, and is only for the purpose of erecting houses as homes for the applicants and their families. Till the advances are paid off dealings with the land are subject to certain conditions as between the owner and the Board which makes the advances and works the power of the Act.

Land.—9 Ed. VII. No. 20, repeals a large number of former Acts relating to lands in Queensland,¹ and makes considerable amendments of details, including provisions for declaring an area open for "group" selections to be held by bodies of settlers.

Education.—9 Ed. VII. No. 7, provides for the incorporation and endowment of a university for Queensland, and the affiliation of existing and future educational institutions. The university will be governed by a Senate of twenty with power to make statutes subject to approval by the Governor in Council. Provision is made for creating a Council of the university which when fully established will elect half the Senate. The university is to maintain faculties of arts, science, and engineering until other order is taken, and may add other faculties. Provision is made for evening lectures for resident students and diplomas of education as well as degrees.

When any public authority is empowered by law to require any person to submit to examination as to his proficiency in any branch of knowledge or to produce evidence of such proficiency as a condition of obtaining any appointment, scholarship, or other reward of merit, or of being admitted to any profession, calling, or office, the Government may require the Senate to undertake the examination of persons who desire to submit themselves for examination in such branches of knowledge (s. 23).

SUPPLEMENTARY LIST OF ACTS PASSED IN 1909.

Nos. 1, 2, 3, 4, 14.—Appropriation.

No. 5.—Acquisition and working by State of McGregor Creek and Tranvy Cattle Creek Extension.

No. 6.—Validation of agreement before Commissioner of Railways and councils of town of Warwick and shires of Clifton, Glengallan, and Rosenthal, as to construction of a State railway from Warwick to Maryvale.

No. 12.—City of Brisbane water supply and sewerage.

No. 17.—Validation of agreement between Secretary for Railways and Rockhampton Harbour Board, as to branch railway from Alma to Rockhampton, and Gladstone main line.

No. 21.—Tuchekoi Forest Settlement.

¹ In particular Acts relating to Pastoral Leases and Co-operative Communities, Land Settlement, and "Special Selections."

4. SOUTH AUSTRALIA.¹

[Contributed by A. BUCHANAN, ESQ.]

Land Legislation.—*Advances to Settlers on Crown Lands.*—Act 994 of 1909 increases the limit of the advance to be made to any one settler from £400, as fixed by the original Act, No. 963 of 1908,² to £600.

Irrigation and Reclaimed Lands.—Act 979 of 1909 amends the principal Act, 953 of 1908,³ by restoring to the local authorities the jurisdiction and property which, by the principal Act, had been transferred to the Irrigation Boards (ss. 6-9), and by providing that differences between local authorities and Irrigation Boards shall be decided by arbitration (ss. 10-11).

Fibre and Sponges.—Act 981 of 1909 provides for the granting of licences for raising and recovering within the territorial waters of the State of the fibre known as *Posidonia australis* and sponges (s. 4) within areas not exceeding five square miles (s. 5) upon application to the Land Board (s. 6), for terms not exceeding twenty-one years (s. 7 (1)) at an annual rental of £5 per square mile (s. 7 (3)), and subject to the continuous employment of two men or more, according to the area (s. 7 (4)), and the payment of a royalty ranging from 2½ per cent. of the net profits where they exceed 5 per cent. to 20 per cent. of the net profits where they exceed 100 per cent. (s. 7 (5) and schedule). Transfers and sub-licences may only be made with the consent of the Commissioner of Crown Lands (s. 8). Licences are to confer exclusive right to remove and appropriate fibre and sponges (s. 9). Regulations may be made for carrying out the Act and for prescribing close seasons for sponges (s. 11).

Mining.—*On Private Property.*—Act 992 of 1909 consolidates and amends the law upon this subject. The Act enables a right to mine on private land to be acquired by resumption of the land, or its proclamation as an alluvial field, or by compulsory mining lease (s. 7), but does not extend to gardens or orchards, or land within 200 yards of buildings or water reservoirs, nor to land occupied for charitable purposes or by local authorities for parks (s. 5). Part II. provides for the resumption by the Crown of the ownership of private land reasonably supposed to contain payable reef metal which the owner, after notice, fails to work (s. 8), provisionally, in the first instance, for six months, during which the land may be dealt with by licensees for mining purposes (s. 13), and afterwards absolutely (s. 9), compensation being paid as on compulsory purchase under the Land Clauses Consolidation Act (s. 10), exclusive, however, of the metals (s. 11), the previous owner being entitled to the royalties reserved, less a commission of 2½ per cent. to be retained by the Government (s. 17). Part III. provides that lands reasonably supposed to

¹ The legislation of the year 1909, being that of the third session of the nineteenth Parliament, is here reviewed.

² See Journal, N.S. vol. x. p. 348.

³ See Journal, N.S. vol. x. p. 348.

contain payable alluvial metal may, in the absence of working, after notice, be proclaimed as an alluvial field, and dealt with under the laws relating to alluvial mining on Crown lands on payment of rent by special licensees (s. 18), the owner being entitled to the rents and fees less a commission (s. 19), and further to insist upon the absolute resumption of the land (s. 22), the prior owner to have the first right to purchase resumed land which may be no longer required for mining purposes. Part IV. contains provisions enabling a person desirous of obtaining a lease or claim on private land to enter thereon under the authority of the Minister or a Warden for the purpose of pegging out the land he may desire (s. 25), but not for the purpose of mining, unless or until compensation has been paid or agreed (s. 26). Part V. provides for compulsory mining leases for gold not exceeding 20 acres, and of minerals not exceeding 40 acres in area (ss. 29-30), after notice, and failure on the part of the owner to work, to be granted either by the owner by agreement or, on failure of agreement, by the Minister, at a rent to be assessed by the local Court nearest the land, subject to royalties and conditions specified in the Act (ss. 32-3), which leases may be cancelled for non-compliance with the specified working conditions (s. 35).

Fisheries.—Act 977 of 1909 amends the principal Act, 864 of 1904,¹ and repeals the amending Act 901 of 1905.² The duties of inspectors are re-defined (s. 5), and their powers added to (s. 6). The list of offences is extended (ss. 8-9). Fishermen's licences are restricted to natural-born or naturalised British subjects (s. 13), and their fishing-boats are to be registered (s. 16).

Libraries and Museums.—*The Public Library, Museum and Art Gallery, and Institutes.*—Act 986 of 1909 consolidates and amends the law governing these institutions. Part II. continues the Board of Governors under Act 296 of 1883-4 (s. 6), but reduces the number of members to fourteen, of whom five are to be appointed by the Governor, and the remainder elected, two by the University of Adelaide, one by the South Australian Society of Arts, one by the Royal Society of South Australia, one by the South Australian Branch of the Royal Geographical Society of Australasia, and three by the Institutes Association of South Australia (s. 7), and provides the machinery for the conduct of elections (s. 10), and for the filling of vacancies (ss. 13-14). The Board has the care and control of the lands and buildings, and has vested in it the personal property of the institutions (ss. 19-20), power to appoint officers (s. 21), receive and apply moneys (s. 22), and to make regulations for the conduct of the institutions, and generally for the purposes of the Act (s. 26). Part III. continues the Adelaide Circulating Library (s. 31) under the management of a committee elected by the subscribers (s. 36). Part IV. provides for the constitution, property, and government of urban, suburban, and country institutes (Div. I.), the mortgaging, subject to the consent of the Minister, of institute property to raise funds for building or permanent

¹ See *Legislation of the Empire*, vol. ii. p. 38.

² See *Journal*, N.S. vol. vii. p. 145.

additions (Div. II.), the sale of institute property, subject to certain consents, freed from trusts (Div. III.), the dissolution of institutes (Div. IV.), the sale of institutes to the Local Government authorities to be carried on by them under the management of a committee elected by subscribers (Div. V.), the transfer of institutes to Local Government authorities under the Free Libraries Act, 1898¹ (Div. VI.), and the amalgamation of institutes (Div. VII.). Part V. incorporates the Institutes Association of South Australia (Div. I.), which is to meet annually, the constituent institutes being represented by from one to three delegates, according to their membership (Div. II.), its affairs being managed by a council of twelve, of whom seven are elected by the Association and five appointed by the Governor, the chief functions of which are to offer advice to institutes, to circulate amongst institutes boxes of books, pictures, etc., and to allocate amongst them such moneys as may be voted by Parliament for such purposes (Div. III.).

State Children.—Act 996 of 1909 amends the principal Act, 641 of 1895, in the direction of facilitating the Council in prosecuting offences against (s. 10) and enforcing orders made under the Act (s. 8), prohibiting the hearing of informations against children at ordinary Courts (s. 3), and substituting, in the case of children, the control of the Council for imprisonment (s. 11). Affiliation cases are to be heard *in camera* (s. 12), and the defendant is a compellable witness (s. 13), the homes of illegitimate children under seven years of age are liable to inspection (s. 18), neglected or incorrigible children may be placed under the control of the Council until eighteen years of age without being placed in an institution (s. 21), and shall be deemed "State children" (s. 22). For parents, whether out of the State or not, to fail to provide proper maintenance for children, whether legitimate or illegitimate, is made an offence punishable by fine or imprisonment (s. 27). In affiliation proceedings, males, other than the defendant, who admit upon oath sexual intercourse with the mother within specified limits of time may be ordered to contribute to maintenance and confinement expenses (s. 28). In affiliation proceedings, corroboration of the mother's evidence is not to be necessary unless denied by the defendant upon oath (s. 29). Corporal punishment may be inflicted upon State children placed out only in accordance with regulations in the presence of an adult witness, and must be reported to the Council (s. 30).

Public Health.—Act 991 of 1909 amends the Health Act, 1898.² It allows sanitary rates to be levied in respect of parts of a Local Government area (s. 3), and sanitary expenses to be defrayed out of the general revenue of the local authority (s. 4). Medical practitioners are to be paid a fee of 2s. for each report notifying an infectious disease (s. 5).

Trade Regulations.—*Inflammable Oils.*—Act 987 of 1909 amends the provisions of the principal Act, 958 of 1908,³ in respect of the conditions and

¹ See *Legislation of the Empire*, vol. ii. p. 4.

² *Ibid.* vol. ii. p. 2.

³ See *Journal*, N.S. vol. x. p. 351.

rules relating to licensed stores and the giving of notices before shipment of oils.

Local Government.—*Municipal Corporations.*—Act 978 of 1909 adds wood blocking or asphaltting of streets to the list of permanent works specified in Act 833 of 1903 (s. 14),¹ the cost of which may be borrowed on security of the rates.

Animals.—*Prevention of Cruelty.*—Act 997 of 1909 extends the Act 956 of 1908,² by making the master liable in cases where the offence is committed by the servant after notice to the master.

5. TASMANIA.

[Contributed by B. C. FERRERS, ESQ.]

Acts passed—63.

Potato Diseases.—Act No. 5 contains stringent regulations for the eradication of diseases affecting the potato. The Governor is empowered to prohibit the removal of potatoes from or to any specified place in the State, and to declare any parcel of land or any building a quarantine for the reception of diseased potatoes (s. 4). The Minister administering the Act may declare any district to be infested and make any regulations necessary for the prevention of the disease (ss. 9, 10).

S. 11 imposes upon an occupier of potato land an annual rate of from 1s. to 2s. per acre.

No. 49, an amending Act, empowers the Governor to exempt any area from the provisions of the principal Act.

Land Valuation.—An important enactment (No. 7) contains many of the provisions of the New Zealand Act of 1900.³

Part I. deals with definitions. "Capital value" of land is interpreted as the sum which the fee simple of the land might be expected to realise at the time of the valuation, if offered for sale on reasonable terms (s. 2).

Part II. provides for the administration of the Act. By s. 5 the Commissioner of Taxes is appointed Chief Valuer under the Act, the Governor being empowered by s. 6 to appoint district valuers and other officers.

Part III.—Land Valuation Rolls.—A valuation roll of the land in each district is to be prepared, stating, *inter alia*, the description, situation, name, and residence of owner and occupier, and the area and capital value of each separate property (s. 11 (1)).

Ss. 14 and 15 provide for the revision by the Chief Valuer of the district valuation rolls. Any person may require the Chief Valuer to make a fresh

¹ See *Legislation of the Empire*, vol. ii. p. 32.

² See *Journal*, N.S. vol. x. p. 351.

³ No. 17 of 1900. See *Legislation of the Empire*, vol. ii. p. 232.

valuation of his property (s. 17). Notice of the valuation roll is to be published and facilities are given to owners to raise objections (ss. 18-20).

The Chief Valuer has power to allow objections (s. 23); all objections not so allowed are to be determined by a court of review (s. 25), which is to have all the powers conferred by the Local Courts Act, 1896.

The decision of a court of review is final except on points of law, when appeal, in the form of a special case to be agreed on by the parties, lies to the Supreme Court (ss. 27, 34, 35). The order of the Supreme Court is final (s. 38).

The powers of officers acting under this statute are determined in Part V., which follows the provisions of the Act of 1900.¹

Death Duties.—The definitions of the terms “property” and “property passing on the death” given in the English Finance Act, 1894, are followed in s. 2 of Act No. 8.

Where death duty is payable in the United Kingdom in respect of property situated there, a sum equal to the amount paid is to be deducted from the duty payable in Tasmania in respect of the same property (s. 3).

Taxation.—The Acts of 1904² and 1906³ are amended by No. 10. Under s. 3, where the income of a taxpayer consists of salary or wages, the amount of tax payable by him shall be based on the amount of such income and not upon the value of property or of board and lodging.

The employer of any taxpayer who is in default with payment of taxes may be declared an agent for his employee and compelled to deduct from salary or wages sufficient to meet the liability (s. 8).

Land Tax.—The Land Tax Act, 1905,⁴ is amended by Act No. 18 and the amount of the graduated land tax payable under that statute is increased by one-fourth the original amount (s. 2).

Income Tax.—No. 19 amends the Act of 1902⁵ with special reference to mining companies.

Summary Jurisdiction (Married Persons).—In 1896 Western Australia and New Zealand, following the English Act of 1895,⁶ conferred on magistrates summary jurisdiction in reference to married persons. Tasmania has now adopted the same course, and since the passing of Act No. 26 a married woman may apply to a police magistrate or two justices of the peace for a separation order on any of the following grounds: (i) where the husband has been convicted of an assault upon her; (ii) desertion by the husband; (iii) persistent cruelty or wilful neglect; (iv) where the husband is an “habitual drunkard”; (v) adultery on the part of the husband. It will be noticed that the Act confers on married women greater powers than those given by the

¹ No. 4 of 1900.

² No. 17 of 1904. See *Legislation of the Empire*, vol. ii. p. 73.

³ No. 32 of 1906.

⁴ No. 4 of 1905. See *Legislation of the Empire*, vol. ii. p. 76.

⁵ No. 29 of 1902. See *Legislation of the Empire*, vol. ii. p. 68.

⁶ 58 & 59 Vict. c. 39.

English statute. In Tasmania a married woman may obtain a separation order on the ground of a husband's adultery, whereas in England only such adultery as amounts to desertion entitles a married woman to obtain such relief in a Court of summary jurisdiction. Moreover, s. 11 of the Tasmanian statute enacts that all the provisions of the Act shall apply so as to entitle a married *man* to the benefit thereof.

Bills of Exchange.—The principal Act of 1884 is amended by Act No. 31. Where a bank pays a customer's cheque which has been fraudulently altered owing to the gross negligence of the drawer, s. 2 relieves the bank of any responsibility with regard to the paying of the cheque.

Coroners.—No. 33 amends the law concerning coroners. Inquests are to be held before a coroner sitting alone unless (i) the coroner considers it desirable to have a jury; (ii) a relative or friend of the deceased makes a request in writing for a jury; (iii) the Attorney-General or Solicitor-General directs that the inquest shall be held before a coroner and a jury (s. 3).

A coroner sitting alone is to have all the powers formerly conferred on a coroner and a jury (s. 4.).

The Act directs that seven jurors be summoned instead of twelve.

S. 10 declares an inquest to be necessary in three cases: (a) where there is reasonable cause to suspect that the deceased has died a violent or unnatural death; or (b) a sudden death from some cause unknown; or (c) where the deceased has died in prison or under such circumstances as to require an inquest in pursuance of any Act.

S. 11 empowers a coroner to order the payment of expenses of witnesses.

Influx of Criminals Prevention.—Act No. 34 follows the lines of legislation in New South Wales in 1903,¹ and Queensland in 1905,² and prohibits persons convicted of certain offences in any place beyond the limits of Tasmania from coming into the State before the lapse of three years after the termination of any imprisonment suffered by them.

Land Surveyors.—No. 45, a comprehensive enactment, provides for the registration, control, and practice of land surveyors. A Surveyors' Board, consisting of seven surveyors, is appointed for the execution of the Act.

Landlord and Tenant.—No. 47 amends the Act of 1874, and gives to under-tenants and lodgers the protection afforded to lodgers in the United Kingdom by the Lodgers' Goods Protection Act, 1871.

Where a superior landlord levies distress on the goods of an under-tenant or lodger for arrears of rent due from the immediate tenant, the under-tenant or lodger may make a declaration that the immediate tenant has no property in the goods distrained. If the owner of the goods undertakes

¹ No. 6 of 1903. See *Legislation of the Empire*, vol. i. p. 474.

² No. 24 of 1905. See *Legislation of the Empire*, vol. i. p. 533.

to pay his rent to the superior landlord, the latter is then prohibited by the Act from proceeding with the distraint (ss. 5, 6). Any possible abuse of the protection thus afforded to sub-lessees and lodgers is prevented by s. 8, which excludes from this provision (i) goods belonging to the husband or wife of the tenant whose rent is in arrear; (ii) goods comprised in any bill of sale made by such tenant; (iii) goods in the possession of such tenant by the consent of the true owner, under such circumstances that the tenant is the reputed owner thereof.

Sewing-machines, knitting-machines, type-writing machines, and mangles are exempt from distress in certain cases (s. 10).

Gold.—The operation of the Gold Act, 1908,¹ was suspended by Act No. 3 and then repealed by No. 48, which came into operation in April 1910, and regulates the buying of gold. Most of the more important provisions of the Act of 1908 are embodied in the new statute. The chief alteration made in the law is that the Minister for Mines is constituted the licensing authority for the purposes of the Act. Formerly the licensing of gold-buyers was dealt with at petty sessions.

Contagious Diseases (Cattle).—The Acts of 1900² and 1903³ are repealed and the Act of 1861 is amended by Act No. 50.

S. 6 provides that cattle shall not be imported into Tasmania unless they are bred from herds that have been immune from disease for three years prior to the shipment of the cattle.

Supreme Court (No. 62).—A judge having advised upon or being interested in any matter before the Court, may retire from the bench; in such cases the remaining judge or judges shall be deemed to constitute the full Court.

SUPPLEMENTARY LIST.

The following are Acts of a formal nature:

Supply (No. 1), *Appropriation* (No. 4), *Supply* (No. 9), *Public Health Amendment* (No. 28), *Appropriation* (No. 35), *Supplementary Appropriation* (No. 36), *Treasury Bills* (No. 58), *Inscription Stock and Treasury Bills* (No. 59), *Inscription Stock and Treasury Bills* (No. 60), *Inscription Stock and Treasury Bills* (No. 61).

6. VICTORIA.⁴

[Contributed by C. J. ZICHY-WOINARSKI and W. HARRISON MOORE, ESQRS.]

Acts passed (second Session)—55.

An unusually large proportion of the public Acts passed in this session are of a character which is rather local or private.

¹ See Journal, N.S. vol. x. p. 340.

² 64 Vict. No. 32.

³ 3 Ed. VII. No. 9.

⁴ The Legislation of the first Session of 1909 was reviewed in the Journal, N.S. vol. x. p. 346.

Land.—The Lands Act, 1909 (No. 2228), is a short measure and is largely an Act affecting the administration of the earlier Lands Acts. The Lands Department is empowered by it, for special cause to be shown by an applicant, to postpone the payment of rent or licence-fees for a period of three years in Wallee County or for a period of five years in other parts of the State. This is to enable the applicant holder of such land to put his financial strength into the improvement of his land, and the applicant, in addition to the fencing and other improvements required under his licence or conditional purchase lease, must, to entitle himself to receive this indulgence, agree to effect to the satisfaction of the Department certain specified improvements upon the land (s. 2). The Act also empowers the Minister, upon application made by a selector of land who has become such since the year 1903 and who does not occupy a holding under the Closer Settlement Acts and who makes his application within twelve months of the passing of the Act, to appoint a Board of review to revalue any such land, and if the Board is of opinion that the existing value already set upon the land is too high, it may certify that fact to the Minister and also fix what in its opinion the value should be, and the Governor in Council may thereafter accept a surrender of the existing licence or lease and may issue to the selector a new licence or lease at the reduced value fixed by the Board so appointed (s. 4).

It had been the practice of the Lands Department to allow persons over the age of eighteen years of age and under twenty-four years of age to select land under the Lands Acts. This practice finds ratification in s. 3, and the section also makes it lawful for the future for any person over the age of eighteen years of age to select land under any of the Lands Acts in force. S. 5 deals with the re-transfer of leases or licences upon insolvency or death. At present trustees in insolvency and executors and administrators are limited to twelve months from the date of probate or administration being granted within which to transfer the lease or licence of a deceased holder, and this limit of time had been found to work harshly from time to time, and this section therefore extinguishes any limit of time in the case of re-transfers by executors or administrators. Minor amendments in the Lands Act, 1904, and the Wallee Leases Act, 1907, complete this Act.

Closer Settlement (No. 2229).—This Act is the latest of the long series of statutes dealing with this subject, and is to be read with the Closer Settlement Act, 1904, and succeeding Acts, save that it repeals most of the Small Improved Holdings Act, 1906.¹ The whole of the provisions of the principal Act relating to compulsory acquisition are repealed and superseded by the scheme of the present Act. This, however, does not involve any alteration of principle, and particularly leaves the necessity for the concurrence of both Houses of Parliament in the exercise of this power. There are elaborate and precise provisions concerning the

¹ See *Legislation of the Empire*, vol. ii. p. 146.

basis of compensation (s. 28 (2): the value of the land is to be assessed without reference to any increase in value arising from the proposal to carry out the purposes of closer settlement); the tribunal and procedure for determining compensation (ss. 34 and 35: the tribunal is a judge of the Supreme Court without a jury or assessors); the mode of payment, and the adjustment of the interest of leaseholders, mortgagees, and other encumbrancers. In pursuance of the policy of conserving the interests of the State in areas suitable for irrigation, it is provided that lands suitable for closer settlement in Irrigation Districts may, on the recommendation of the Rivers and Water Supply Commission, be acquired, even though there is for the time being no actual demand for land for such purposes (s. 13). By ss. 81 and 82 the Closer Settlement Board has power to suspend payment of a tenant's instalments under a conditional purchase-lease for a term of five years, on condition of the tenant making such additional improvements as may be agreed—the concession may be based either on the ground that the applicant for some special cause is not likely to be able to pay the instalments (s. 81) or that the land is not likely to be immediately remunerative (s. 82). Part IV. of the Act deals with advances to settlers, a matter now committed to the administration of the Board; such advances shall not in any year exceed £200,000 (see also s. 9). Perhaps the most important feature of the Act is its augmentation of the status and powers of the Lands Purchase and Management Board established by the principal Act. Under that Act the members of the Board were to be paid by fees, which were not in the case of any member to exceed £300 per annum. Now, a permanent Chairman is to be appointed with a salary of £1,000 a year, and the other two members of the Board receive a salary of £700. To the Board is committed the administration of the laws relating to closer settlement. The scheme generally aims at a more skilled, consistent, and flexible management than in the past, and also in view of the discretionary character of many of the powers conferred, at the removal of administration from direct political influence. The members of the Board have a tenure not exceeding four years.

Water (No. 2226).—This Act amends and is to be read in conjunction with the Water Act, 1905.¹ The Act deals in the main with administrative machinery without introducing any new substantive provision of importance, and transfers to the Water Commission established by the principal Act many functions relating to water conservation and supply and national works in connection therewith hitherto performed by the Department of Water Supply or the Board of Land and Works. The salaries of the Commissioners are raised, in the case of the chairman, from a maximum of £1,200 to £2,000, and in the case of the other Commissioners from £800 to £1,000. The Commissioners are required to raise an amount of 2 per cent. per annum on the cost of all works constructed in any district

¹ See *Legislation of the Empire*, vol. ii. p. 139.

for the purpose of a redemption fund (s. 19), and in the case of works of a perishable or deteriorating character the Commissioners must raise a further 5 per cent. for a depreciation fund (s. 20).

Sheep Dipping (No. 2216).—This Act requires every owner of sheep to dip his sheep immediately after shearing, unless he has obtained a “clean certificate” that all his sheep and lambs are free from ticks and lice. There are various other provisions in the Act designed to prevent the spread of ticks and lice.

Distress.—The Landlord and Tenant Act, 1909 (No. 2211), is almost a reprint of the Imperial Act,¹ which restricts the right of distress of a landlord to distress upon the goods of his own tenant. Previously protection had been given by statute law to lodgers who were entitled—upon supplying an inventory of their goods and upon making a declaration to ownership and upon setting forth what rent or board money was owing and paying it to the superior landlord—to recover their goods whenever seized for distress by the superior landlord. The Victorian Act enlarges this protection to cover the cases of strangers and of under-tenants whose goods may have been seized, but it is wider in its terms than the Imperial Act in being made applicable to *all* under-tenants, and not to under-tenants only whose rent is payable at terms of not less than three months. In other words s. 5 of the Imperial Act is not enacted in Victoria. The Victorian Act, too, gives protection to goods in the reputed ownership of a tenant. It also enlarges the time to replevy goods from five to fifteen days upon security being given and a written request made for the extension.

Settled Estates and Settled Land.—Necessarily the Settled Estates and Settled Land Act, 1909 (No. 2235), is a highly technical Act, and a short notice only is attempted and without details. In the main it brings the law on this subject in Victoria into line with the present English statutes. It takes the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), as amended by 44 & 45 Vict. c. 41, ss. 41 and 70, and 57 & 58 Vict. c. 56, as the basis of the present settled estate law in England, and omitting some provisions as inapplicable to Victoria and modifying others to make them fit in with existing law and procedure in Victoria, it embodies it as Part I. of the two Parts of this Act. For practical purposes Part I. will not be of such value as Part II., because Part I. “does not confer, or enable the Court to confer, on a limited owner powers beyond those ordinarily inserted in any well-drawn settlement.” “The Court” in the Act means the Supreme Court only and does not include the County Court. In applications to the Court under Part I. which require to be made with the consent of the persons in existence having any beneficial estate or interest under the settlement it is provided that “where two or more of such persons can in the opinion of the judge be grouped into classes having similar or substantially similar interests so far as the objects

¹ 8 Ed. VII. c. 53.

or results of the application are concerned, the judge may at the request of the applicant for the sake of economy or despatch permit or direct all the beneficiaries in any such class to be represented at the hearing of the application and of any order made therein, by one and the same representative nominated and approved by the judge" (s. 21). The Court may also dispense with notice or consent where a person interested cannot be found or it is uncertain if he is living or dead (s. 24).

The Court's power to grant leases under Part I. is in the case of building leases shortened to a term not exceeding fifty years.

Part II. of the Act is based on the Settled Lands Act, 1882, as amended by 47 & 48 Vict. c. 18, 50 & 51 Vict. c. 30, 52 & 53 Vict. c. 36, 53 & 54 Vict. c. 69, and 61 & 62 Vict. c. 22, and all these Acts aimed at giving the tenant for life a practically absolute control over the disposition of settled land. Part II. of this Act is not only based on the foregoing English statutory law, but it adopts the amendments proposed in the English Bill of 1907, with an important local amendment which is this: whereas under the English statutes a tenant for life can of his own motion and practically at his absolute discretion sell, exchange, partition, mortgage, or charge the corpus of the settled estate, without the consent or approval of the trustees or those entitled in remainder, Part II. of this Act, whilst it confers on him the same powers, requires him before exercising them to obtain either the consent of the trustees or the order of the Court. It is conceived that in most cases the trustees would give their consent, and it is provided that such consent is not to be arbitrarily withheld and that a tenant for life who is dissatisfied with the consent being withheld may apply to the judge in chambers for an order authorising him to do the particular act in question without such consent (s. 110). In other respects the suggestions of the English Bill of 1907 are adopted as being of unquestionable utility for supplying certain wants and as curing certain defects and ambiguities in the law which were discovered from time to time in cases before the English Courts or by legal practitioners.

Coal-Mines.—The Coal-Mines Regulation Act, 1909 (No. 2240), prohibits the employment underground of boys and also their employment in caging or uncaging trucks or skips on cages or as landers or as bracemen, and it prohibits altogether the employment of boys under fourteen years of age and of females (s. 6). No person with certain exceptions (as *e.g.* a manager, a chief engineer or electrician, etc.) may be employed more than eight hours a day or forty-eight hours a week, and in the case of underground miners the time is to be reckoned from when the miner commences to descend the mine until he returns to the surface (ss. 7 and 8).

Wages must be in cash and may not be paid in any public-house or place adjacent. Each skip is to be weighed and all the coal paid for, but owners may in writing agree with the miners as to deductions for stones and other substances from the weight of the output, and the

"average weight" system may be accepted. The miners may appoint check weighers to act for them at the weighing machines and to see that they get fair play, and the machines are to be tested at regular intervals by an inspector under the Weights and Measures Act, 1890 (ss. 12-17).

Mine-owners are compelled, except in certain specified cases where a single shaft or tunnel may be sufficient, to provide two properly appointed and equipped shaft tunnels or outlets in communication with every seam for the time being at work and which will afford separate ingress and egress to the miners, and such shaft tunnels or outlets must not at any point be nearer to one another than 20 yards (ss. 18-21).

Every mine is to be under a manager responsible for the control, management, and direction of the mine, and no person is to be qualified to be a manager who is not the registered holder of a first-class certificate under the Act. Where, however, only twelve persons or less are employed underground it is made sufficient for the manager to hold a permit from the Board of Examiners. Daily personal supervision and daily underground inspection must be made by the manager or by an under-manager nominated in writing by the owner or the manager (ss. 23-4).

A number of sections deal with the constitution of a Board of Examiners for mining managers and their powers under the Act. A first-class certificate is required for the position of a manager and a second-class certificate for that of under-manager, and candidates for a first-class certificate require to have had five years' practical experience in mining and for a second-class certificate three years' such experience. Provision is added for the recognition in the State of Victoria of corresponding certificates granted in other States of the Commonwealth or in New Zealand, whenever a similar recognition is granted by such latter places to certificates granted in Victoria (ss. 25-33). The Act also endows the existing Board of Examiners for engine-drivers in connection with gold-mining operations in Victoria with a power to issue certificates to engine-drivers in coal mines (ss. 34-8).

The Act makes it essential that owners shall

- (a) make half-yearly returns giving particulars as to (1) the name and situation of the mine; (2) the names and descriptions of the owner, manager, and under-manager; (3) the number of persons ordinarily employed therein; (4) the quantity of mineral gotten or wrought; and (5) the ventilation shafts, splits, and supply of fresh air;
- (b) keep in the office of the mine an accurate plan and sections of the shafts, drives, levels, and all other underground workings, including the general direction and rate of dip of the strata, together with a section of the strata sunk through, or if that is not reasonably practicable, a statement of the depth of the shaft with a section of the seam; and supply annually a certified copy of such plan sections to the Secretary for Mines;

- (c) give notice to the inspector of the district (1) where any working is commenced for the purpose of opening a new shaft or seam ; (2) where a shaft or seam is abandoned or its working is discontinued ; (3) where the working of a shaft or seam is recommenced after abandonment ; (4) where any change in the name of a mine, or in that of the owner, manager, or legal manager occurs ;
- (d) fence securely every shaft and entrance from the surface of any mine that is abandoned or any working that is discontinued (ss. 39-43) ;
- (e) give notice to the inspector of the district of any accident or explosion that may occur in or about any mine and causing loss of life or injury (s. 47) ;
- (f) publish in legible characters in some conspicuous place at or near the mine an abstract of the Act and a copy of the special rules made under it (s. 60).

The Act provides for a Chief Mining Inspector and for inspectors, and gives to them all necessary powers to ascertain if the Act and the regulations are being complied with, and gives also power to order the manager of a mine at once to remedy anything dangerous or defective in the mine, subject only to appeal by the owner or manager to the Chief Inspector, whose decision is final (ss. 44-6).

It provides too for the Minister ordering a formal investigation by a person specially appointed by the Minister into the causes and circumstances of any explosion or accident and for such inquiry being held in open Court (ss. 48 and 49). And in any coroner's inquest on any death from any accident in a mine the inquest must be taken and made by jurors who are not to be persons having a personal interest in or employed in the mine or persons who during a period of twelve months have been discharged from the mine ; further, the inspector for the district, the next-of-kin or executor of the person killed, and the mining manager of the mine are authorised to attend the inquest and to put questions to any witness (s. 50).

A large part of the Act is taken up with the tabulation of a number of general rules for health and safety. Most of these rules were already in operation in gold-mining and they are mainly based upon the Imperial Act (50 & 51 Vict. c. 58, s. 49) and the New South Wales Act of 1902, No. 73. In addition to these general rules set forth in the Act itself, there are to be for every miner special rules "for the conduct and guidance of the persons acting in the management of such mine or employed in or about the mine as under the particular state and circumstances of such mine may appear best calculated to prevent dangerous accidents and to provide for the safety, convenience, and proper discipline of the persons employed in or about the mine." These special rules require to be approved by the Minister. The Governor in Council may make special rules which shall

be the special rules for any mine in respect of which no special rules have been framed or shall be in force (ss. 51-61).

Some special features remain to be noticed. Up to the time of this Act no royalty has been charged by the Crown in Victoria on coal-mining, or, in fact, on any kind of minerals, although in the neighbouring State of New South Wales and in the Dominion of New Zealand the royalty system prevails. This Act provides for the payment of a royalty of not more than 1s. a ton on the output of all marketable coal raised under any lease for coal-mining granted or renewed. When the amount of the royalty exceeds the rent charged under the lease, the rent paid is to be deemed to be royalty (s. 62). Power too is taken to have Crown land bored for coal-mining, and then thrown open to application; and the lessee of such land has then to pay by way of a further rent so much of the cost of any work done on the land as in the opinion of the Governor in Council is reasonable, having regard to the benefit accrued or likely to accrue, and this further rent is not to be included in the royalty payable (s. 63).

Another special feature is the creation of the Victorian Coal Miners' Accident Relief Fund, so that the industry may practically provide for those who are injured in the mines. The fund is to be fed in this way: all employees at each mine are to contribute at the rate of $4\frac{1}{2}$ d. a week, owners are to contribute at the rate of one-half of the aggregate amount contributed by the employees, and the Government of Victoria is to subsidise the fund annually by a sum equal to that contributed by the owners. A committee at each mine is constituted called the Accident Committee; and these committees are to be responsible to the Victorian Coal Miners' Accident Relief Board for all receipts and disbursements at their respective mines, and the Board will have control over the whole fund. It is observable that in the State coal-mine the Government will pay as owners in addition to the subsidy.

The grant of allowances is made by the Accident Committee for any mine and in accordance with prescribed conditions and scale, and is in addition to any payment under the rules of any friendly or benefit society, and is not to affect the compensation payable by the owner of a mine in any action under the Employers' Liability Act (ss. 73-83).

The last and perhaps the most important special feature is Part II. of the Act establishing in Victoria State coal-mines. Hitherto the State of Victoria has been through the Commissioners of Railways an interested patron of the privately-owned coal-mines; now, as being so very large a customer for coal, it proposes itself to mine for coal, and open and establish coal-mines. Such coal-mines are to be vested in the Railway Commissioners, and full powers are conferred for carrying on coal-mining and for selling the slack coal, and all moneys receivable are payable into the public account, and out of the net surplus profits a sinking fund and depreciation fund are to be established in respect of the capital expended (ss. 84-99).

Marriage (No. 2192).—This Act requires that the head of every religious denomination in Victoria shall annually furnish to the Government Statist a full and complete list of ministers for the celebration of marriage who “are exercising the functions of officiating ministers of such denomination and have not been degraded or deprived of their authority by their superior or the recognised church court or tribunal of the denomination”; ministers whose names do not appear in the lists furnished are forthwith to be removed from the register of persons authorised to celebrate marriages (s. 5). Ministers who, in the opinion of the Chief Secretary, are making a business of celebrating marriages for gain, irrespective of carrying on the ordinary duties of a minister, may be prohibited from celebrating marriages (s. 4). No minister may celebrate a marriage except after three days’ written notice, but in cases of emergency a justice of the peace may dispense with this notice (s. 2); and the sanction for breach of this provision and of provisions of prior Acts relating to hours of celebration is not the nullity of the marriage, but punishment of the person celebrating it (s. 3). S. 6 declares that “nothing in this Act except s. 5 shall extend to any marriage in the religious Society of Friends commonly called Quakers, or of Jews, but every such marriage shall be as legal and valid as if duly solemnised under the provisions of the Marriage Acts if such marriage was, when celebrated, a valid marriage according to the usages of the Quakers or the Jews, as the case may be.” This rather curious provision must plainly be limited to the *forms* of marriage and its formal validity.

Infants’ Relief (No. 2227).—This Act introduces into Victoria the provisions of 37 & 38 Vict. c. 62, avoiding infants’ contracts and prohibiting ratification, and 55 Vict. c. 4, s. 5, as to contracts of loan made during infancy. It also repeals s. 215 of the Instruments Act, 1890, which had declared that no action should be brought on any promise or ratification after full age in respect of any debt incurred during infancy, unless such promise or ratification was in writing.

Old Age Pensions (No. 2209).—In contemplation of the assumption of the burden of old age pensions by the Commonwealth, this Act provides for the release of all property of pensioners which had under the Victorian Acts become vested in Victorian authorities.

Probate Duties.—The Administration and Probate Duties Act, 1909 (No. 2214), merely continues for a further period of twelve months (December 31, 1909—January 1, 1911) the present rates of probate duty chargeable on real and personal property in Victoria of deceased persons.

Motor-Cars (No. 2237).—This Act—the first on the subject in Victoria—requires all cars to be registered and numbered and fixes a uniform fee of £1 for cars and 2s. 6d. for cycles. Drivers are to be licensed annually and no person under the age of eighteen may receive a licence; and on conviction for any offence under the Act (other than a first or second conviction for exceeding any speed limit) the licence may be suspended or endorsed,

and the Court may disqualify the offender for receiving a renewal of licence for such time as it thinks fit, subject to an appeal to the Court of General Sessions (s. 8). A Victorian pass available for one week may be obtained in lieu of a licence in the case of cars coming into Victoria from other States (s. 9). Reckless driving is the subject of s. 10, whereby "if any person drives a motor-car on a public highway recklessly or negligently or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway and to the amount of traffic which actually is at the time or which might reasonably be expected to be on the highway," he is guilty of an offence, and where an accident has occurred as a result of such driving he shall have his licence cancelled and may be disqualified. Persons who refuse their name and address or whose cars are not numbered may be arrested; and owners of cars are required, under penalty, to assist in the discovery of the person driving in contravention of the section. It is also an offence for a driver to refuse to stop when called on by any member of the police force. Excessive noise, smoke, or smell is prohibited by s. 11, and owner and driver are both liable in such a case. S. 12 requires a lamp to be carried in front of the car, and a rear lamp to show the number; and s. 13 requires a bell or horn to be carried. Where an accident occurs owing to the presence of a car, the car driver is required to stop and render such assistance as may be necessary, and to give his name and address as well as that of the owner of the car on demand (s. 14). The provisions of the Act may be supplemented in important particulars by regulations issued by the Governor in Council, *e.g.* identification, the mechanism of cars, and means for minimising noise and smell, traffic on Sundays near places of worship during progress of service, speed limits in specified localities, the notification of dangerous places by municipal councils. Any such regulation may be general or local and shall supersede any regulation or by-law made on the same matter by any municipality. The use of cars or particular kinds of cars may be prohibited on particular roads. Revenue arising under the Act from fees or penalties is paid as to one-half into the Consolidated Revenue and as to the other half into a Trust Fund called the Municipal Motor Fees and Fines Trust Fund, for distribution among the municipal councils as the Chief Secretary directs (s. 21). Nothing in the Act is to affect any liability civil or criminal of drivers or owners at common law or under any statute (s. 23). The Act is made applicable to persons in the public service of the Crown as well as to other persons (s. 24).

Railway Funds (No. 2207).—In 1907 an Act (No. 2133) provided that the surplus railway revenue for any year should be divided into two parts and paid into two permanent funds then established, called the Railway Interest Reserve Fund and the Railway Additions and Improvements Fund, and that this should continue until the funds amounted to £300,000 and

£200,000 respectively. The first fund was to be available for paying interest on Railway Loan Funds to the extent to which the net railway revenue for any year should be insufficient; the second fund was to be available for such expenditure as Parliament might from time to time authorise for additions and improvements on existing railways, and for equipment and rolling stock. The present Act declares that the surplus railway revenue for any year shall on the certificate of the Auditor-General be available to meet any deficiency in general revenue for that year, but the Government is to pay interest at $3\frac{1}{2}$ per cent. to the funds in question until the amount so taken is restored. Where the general revenue is in excess of expenditure, recoupments to the railway funds shall be made until they reach the maximum provided for by the Act of 1907.

Companies.—The Companies' Names Act, 1909 (No. 2203), was passed in response to a request for legislation on the subject made by the Imperial authorities, and seeks to restrict the use by a company of any title which may be inclined to mislead the public into a belief as to Royal patronage of the company. An earlier Act on the subject was the Companies' Names Act, 1908,¹ restricting the use in a company's name of the words "Empire" or "Imperial." This present Act goes further and prohibits, without the previous consent of the Governor in Council, the use in a company's name of the words "Royal," "King," "Queen," or "Crown." The Governor in Council is not to give such consent if in its opinion the use of such word by a company would imply or be likely to convey the impression that the company is wholly or partly authorised or supported by or connected with His Majesty's Government in England or Victoria or any part of His Majesty's Dominions.

Poisons.—The Poisons Act, 1909 (No. 2206), is to exempt from the present stringent provisions of the law as to the sale of poisons certain preparations which are used in Victoria for sheep dips or for agricultural or horticultural purposes. To become exempt the preparation must be contained in a closed vessel or packet distinctly labelled with the word "Poison" in clear type and with the name and address of the seller and with a notice of the special purpose for which it is intended. The Governor in Council is given power to prescribe the conditions for the sale of any such preparations.

7. WESTERN AUSTRALIA.

Acts passed—58.

No distinction is made between the Acts which are "Public General" and "Local and Personal." Nos. 1, 9, 15, 22, 28, 35, 38, 45, and 48 would probably be placed in the latter class in the United Kingdom, in addition to a consolidating Act (No. 43) in relation to the metropolitan water supply.

¹ See Journal, N.S. vol. x. p. 344.

Nos. 2, 3, 6, 41, and 42 are Acts authorising the construction of various railways by the Government. Nos. 7, 8, 11, 27, 33, and 56 deal with land reserves. Nos. 14, 16, 18, 20, 23, 30, 53, and 58 are Finance Acts of the usual character.

Liquor Licensing.—No. 5 has for its object to strengthen the law by an amendment of the Wines, Beer and Spirit Act, 1880, and to secure as far as possible that the liquor consumed shall be Australian.

Vermin.—The Vermin Boards Act (No. 10) is merely an extension of the Act of 1902¹ to get rid of the rabbit pest. "Vermin" means rabbits and wild dogs and any other animal which the Governor may declare to be vermin. The Act constitutes a Board with the usual powers to do their best to destroy the vermin.

Fire Brigades.—The Fire Brigades Act, 1898,² applied to the municipal district of the municipality of Perth and any other municipality to which it might be extended. The present Act divides the State into two districts—the South-West and the Central—and allows the municipalities which adopted the previous Act to apply to be included within the provisions of the District Fire Brigades Act (No. 51). Special provision is made for its adoption by the city of Perth. The Act is largely based upon the Victorian Act No. 1200 of 1890, and corresponds in its main features with the Act of 1898.

Limited Partnership.—Act No. 17 is in the terms of the English Act of 1907³ to establish limited partnerships.

Workmen's Compensation.—The Workers' Compensation Act (No. 21) amends the principal Act of 1902 by defining the basis of compensation for casual workers and making provisions for disagreement between the medical practitioners on either side by allowing them to nominate a third or, in default, an appointment to be made by the Court.

Land Surveyors.—The Act of 1895 regulated the licensing of surveyors, and extended provisions are made by the Licensed Surveyors Act (No. 25) for their registration and the control of their practice under the auspices of a Board. The Act introduces provisions of the Queensland Act of 1908⁴ into the Act of 1895.

Carriage of Goods by Sea.—The Sea-Carriage of Goods Act (No. 26) applies to the carriage of goods by sea within the State the provisions of the Commonwealth Act of 1904.

Abattoirs.—The Abattoirs Act (No. 31) provides for the establishment of public abattoirs upon the lines of the Queensland Act of 1898.⁵

Education.—The Public Education Endowment Act (No. 32), is on

¹ No. 34. See *Legislation of the Empire*, vol. ii. p. 188.

² See *Legislation of the Empire*, vol. ii. p. 171.

³ 7 Ed. VII. c. 24. See *Legislation of the Empire*, vol. i. p. 153.

⁴ No. 3. See *Journal*, N.S. vol. x. p. 334.

⁵ No. 23 of 1898: *Legislation of the Empire*, vol. i. p. 500.

the lines of the University Endowment Act, 1904,¹ but extends to all branches of education for the endowment to which funds and property may be held by a body of trustees.

Redemption of Annuities.—No. 34 is an Act for the redemption or annuities charged on or issuing out of land.

Legitimation per subsequens Matrimonium.—The State follows the law of other Australian States by allowing the legitimation of children born before marriage by the subsequent marriage of their parents by Act No. 44.

Agricultural Lands Purchase.—No. 46 repeals the earlier Acts on this subject passed in 1896, 1897, 1898, and 1904, and extends them in order to make better provision for the purchase of lands for immediate settlement and for facilitating settlement.

Roads.—No. 52 enables the Road Boards to render financial assistance to ferries, tramways, hospitals, and fire brigades. *Inter alia* they are permitted to subsidise "any resident medical officer" in the district.

Employment Broker.—The Employment Brokers Act, 1897, is repealed by Act No. 57, and extended provision made for their regulation. An employment broker is defined to mean "every person who follows, for reward, the calling of an agent for procuring engagements for persons seeking to be employed for reward, or for procuring employees for persons seeking to employ them for reward, but shall not apply to persons empowered by law to act in the engagement of seamen." The Act, therefore, corresponds to the English legislation for the licensing of registry offices.

8. PAPUA.

[Contributed by W. F. CRAIES, ESQ.]

Ordinances passed—33.

Finance.—Nos. I., II., III., VI., XVIII., XXI., XXII., XXIII., XXIV., XXXI., and XXXIII. are Appropriation and Supply Acts.

Reprinting Ordinances.—Ordinance No. IX. provides for the incorporation in Ordinances amended before or after June 1, 1909, of amendments, consisting in the repeal, omission, or insertion of certain words or figures, or the substitution of words or figures for omitted words or figures. The expression "words" includes part, division, heading, section, sub-section, paragraph, and schedule. The Government printer is to embody such amendments in all reprints of the Ordinance affected, and to make reference in the margin or by footnote to the amending Ordinance, and to print on every amended Ordinance when reprinted a short reference to every Ordinance whereby it has been amended.

¹ See *Legislation of the Empire*, vol. ii. p. 191.

Revenue.—Customs Ordinance No. IV. alters the customs duties on spirits and tobacco, and puts on the free list machinery, motors, cyanide of potassium, and cyanide of zinc.¹

Ordinance No. XII. directs that customable goods taxed *ad valorem* are to be valued at their fair market value in the principal markets of the country of export (s. 1),² and allows owners of goods to appoint an authorised agent to comply on his behalf with the provisions of the customs laws. The agent must be exclusively in the employ of the owner, or be a duly licensed customs agent (s. 2). Provision is made for appointing places for the examination of goods on landing (s. 3).

Stamps.—Ordinance No. XX. imposes stamp duties on bills of exchange, to be denoted by adhesive stamps affixed and cancelled before issue by the maker or holder, and again on payment (ss. 5, 10). Provision is made as to the stamping of foreign bills payable in the territory (ss. 7, 8, 11).

Courts and Legal Procedure.—Ordinance No. XI. provides for the appointment (provisionally or on a particular emergency) by commission of the Governor under the seal of the territory of a deputy chief judicial officer to act during vacancy in the office of chief judicial officer, or his inability to act from illness, or when for any reason he should not preside at the trial of any case.

Ordinance No. XIV. fixes March 31 instead of the month of January for the publication of the jury list required by the Jury Ordinance of 1907.³

Ordinance No. X. provides for the permanent or temporary appointment of a Crown prosecutor to prosecute crimes and offences cognisable in the Central Court of the territory, and (if so requested by the Lieutenant-Governor or chief judicial officer) to conduct prosecutions before a magistrate (ss. 1, 3). All crimes cognisable in the Central Court are to be prosecuted by indictment in the name of the Crown prosecutor,⁴ and the indictment may state the crime to have been committed in the territory of Papua without particularising the exact place where it was committed (s. 3).

Ordinance No. VIII. deals with criminal and civil appeals. The chief judicial officer must, on the application of counsel for the accused person tried in the Central Court on indictment for an indictable offence, and may in his discretion without such application, reserve any question of law arising on the trial for the consideration of the High Court of Australia. The case is stated by the chief judicial officer, and transmitted by him to the High Court (s. 1).⁵ A conviction cannot be

¹ The Ordinance repeals the Customs Ordinances of 1897 and 1903.

² This section is to be brought into force by gazetted Proclamation.

³ See Journal, N.S. vol. viii. p. 432.

⁴ The form set out in the Queensland Criminal Code (adopted) is to be followed with the necessary variations.

⁵ See Queensland Code, s. 668.

set aside for improper admission of evidence if the High Court is satisfied that the evidence was formal and not material, nor for improper admission of evidence adduced for the defence (s. 2). In all civil matters an appeal is given from the Central Court to the High Court of Australia (s. 3). The appeal is to be by case agreed by the parties, or if they disagree stated by the chief judicial officer. The parties may attach their legal arguments to the case, and need not attend personally or by counsel at the hearing of the appeal (s. 9).

Ordinance No. XXXII. provides for the fixing by the chief judicial officer of scales of fees payable to agents for conducting cases in the Central Court in its civil jurisdiction and in the Small Debts Court (s. 1). Till the scale is fixed, the fee is to be £3 in the Small Debts Courts, and varies according to the amount in dispute in the cases in the Central Court with a maximum of £10. No agreement to pay a higher fee is enforceable by action except by special leave of the chief judicial officer. The scale applies where no agreement is made; but an agreement may be made and enforced to pay fees below the scale.

Gold.—Ordinance No. XVIII. provides for the issue of licences to buy gold at a fee of £1. A like sum is payable on renewal. Unlicensed persons buying gold are liable to penalties.

Ordinance No XXIX. authorises the grant of a reward for the discovery of new goldfields. It is not payable unless the new field is more than 20 miles distant from the nearest place where payable gold had been previously obtained, nor unless for eighteen months out of the three years next following the discovery not less than 200 miners of European descent have been employed on the new goldfield. Provision is made for determining who is the first finder of the new field.

Timber.—Ordinance No. XXVIII. consolidates and amends former Ordinances relating to indigenous timber. It regulates:

- (i) the purchase of timber rights from natives and the cutting of timber on native lands;
- (ii) timber reserves and licences to cut timber thereon;
- (iii) sandalwood and rubber.

Provision is made for regulations as to carrying out matters of detail and of penalties for breaches of the Ordinance and such regulations.

Wild Birds.—Ordinance No. XIII.¹ allows the issue of special permits to take prohibited birds for acclimatisation in other countries (s. 1) and permits the Lieutenant-Governor in Council by gazetted proclamation to vary the schedule to the Ordinance of 1908, by adding birds or removing birds from its scope either absolutely or subject to limitations.

Rice.—Ordinance No. XIX. empowers the Lieutenant-Governor in Council to fix a standard quality for imported rice by reference to price or otherwise, and imposes a customs duty (10s. per ton) on all rice up to or

¹ Amending the Ordinance of 1908: see Journal, N.S. vol. x. p. 353.

above the standard, and £2 a ton on all rice below the standard (ss. 1, 3). If rice seems to be below standard on importation it may be submitted for examination to a Government medical officer and another non-official person (s. 4). Rice condemned by a Government medical officer as unfit for human consumption is to be destroyed without compensation (s. 4).

Sago.—Ordinance No. VI. provides for the creation of sago reserves and the grant of licences to cut sago therein. It also deals with the cutting of sago on native lands and the purchase of sago from natives, and provides for the extension of the Ordinance to other indigenous trees and plants.

Lands.—Ordinance No. V. amends the Land Ordinance of 1906¹ by repealing s. 14 and substituting new provisions as to deposits and applications for leases, by allowing forfeited town allotments to be sold by auction or offered by tender (s. 2), and specifies the following places as towns within the Ordinance of 1906: Buna, Port Moresby, Daru, and Samarai.

Ordinance No. XXX. imposes survey fees in respect of certain applications for land under the Ordinance of 1906. The scale is to be fixed by gazetted proclamation.

Contracts of Service.—By the Freedom of Contract Ordinance (No. XV.) a person who, while outside Papua, has entered into a contract to work for an employer in Papua may within three months of arrival obtain from a magistrate the cancellation of the contract on proof that the agreed rate of salary or wages is lower than the rate current in the district for work of the same kind.

Hawkers' and Pedlars' Licences.—Ordinances No. XVI. repeals as to Papua the adopted law of Queensland as to licences for hawkers and pedlars.

Natives.—Ordinance No. XXV.² provides for the better regulation of native affairs. The term "native" includes:

- (i) Aboriginal natives of New Guinea or any island adjacent thereto or of Papua;
- (ii) Aboriginal natives (a) of Australia or any island adjacent thereto; or (b) of any island of the Pacific Ocean; or (c) of any of the East India Islands; or (d) of Malaysia; who live after the manner of aboriginal natives of Papua or the adjacent islands.

The Governor is empowered to appoint magistrates and set up Courts for native matters having jurisdiction only between natives and over natives (ss. 2, 3, 6), and to provide for appeals from the native Courts to the Central Court (s. 4).

The Governor is also empowered to make and provide for the enforcement of regulations affecting the affairs of natives with regard to (1)

¹ See Journal, N.S. vol. viii. p. 338.

² Repealing the Native Board Ordinance of 1889.

marriage and divorce ; (2) succession to property in case of intestacy ; (3) testamentary disposition of property ; (4) disposal of the dead ; (5) rights to real and personal property ; (6) observance of customs ; (7) cultivation of the soil ; and (8) jurisdiction, powers, and procedure of Courts for native affairs in civil and criminal matters.¹

Ordinance No. XXVI. amends the Native Labour Ordinance of 1906² in certain details : (1) by allowing payment of wages in advance instead of giving a guarantee (s. 3) ; (2) by regulating the security to be given on taking natives from Papua (s. 4) ; (3) by requiring with certain exceptions written contracts of service for natives engaged for over three months (s. 6) ; (4) by making Government medical officers absolute arbiters of the fitness or unfitness of a native who wishes to enter into a contract of service (s. 10) ; (5) by empowering the Commissioner of Native Affairs with the consent of the parties to vary native contracts of service (s. 11).

Ordinance No. XXVII. repeals the Removal of Natives Ordinance, 1907.³

9. DOMINION OF NEW ZEALAND.

[*Contributed by* GODFREY R. BENSON, ESQ.]

Public General Acts—36 ; Local and Personal Acts—42.

Finance.—No. 1, being the only Act of the first of the two sessions of Parliament in 1909, consists of temporary provisions made necessary by the postponement of the Appropriation Act.

Designation of Districts Amendment.—No. 7 amends the provisions primarily existing for the alteration, when desired, of the names of boroughs, counties, etc., and requires that in all such alterations in future preference shall be given to the original Maori names.

Land Settlement Finance (No. 8).—This is an Act to facilitate land settlement by providing for the formation of incorporated associations of settlers, which purchase land, borrowing money for the purpose, and subdivide the land purchased among their members. Such an association is only to be formed for the purpose of a particular purchase of which the terms have been approved in detail by the Land Commissioners, and with a definite scheme of sub-division and road-making similarly approved. The debentures which such an association is authorised to issue are guaranteed by the Government.

¹ Cf. the legislation of Fiji and Natal as to native affairs.

² See Journal, N.S. vol. ix. p. 432.

³ See Journal, N.S. vol. ix, p. 432.

Naval Defence.—No. 9 makes provision for the gift to His Majesty of a ship-of-war at a cost not exceeding £2,000,000.

Death Duties (No. 10).—This Act, which replaces the Consolidated Act of 1908, deals in part with previous duties, the estate duty (corresponding in scope to the estate duty of the United Kingdom), and the succession duty (taking the place of the succession and legacy duties). The graduation of estate duty is made much steeper. Estates exceeding £20,000 but not exceeding £25,000 pay 7 per cent.; and the maximum rate, 15 per cent., is reached at £145,000. The Act imposes, moreover, a wholly new duty, "gift duty," evidently intended to check gifts made to avoid estate duty. The rate is 5 per cent. By another new provision in this Act the estate liable to duty includes gifts made within three years of the donor's death; the amount of gift duty paid in such a case is deducted from the amount of estate duty.

Hospital and Charitable Institutions (No. 11).—This is a consolidating and amending Act, replacing the consolidated Act of the previous year.

Friendly Societies (No. 12).—This Act, though primarily an amending Act, also replaces a consolidated Act of last year. Its most notable provision is that which institutes an actuarial valuation, to be made by a Government actuary, of every registered friendly society once every five years.

Inferior Courts Procedure (No. 13).—The general object of this Act is to prevent, so far as possible, proceedings in inferior Courts from being invalidated by reason of minor irregularities or omissions. Parties to civil proceedings in inferior Courts, such as a Warden's Court in the gold-diggings, are to be allowed by their consent to waive any irregularity in the proceedings (including slight excesses of jurisdiction), whether known or unknown to the Court. Again, in appeals against convictions by inferior Courts, large powers are given to the appellate Court to set right technical errors which could formerly have caused the conviction to be set aside. The Act provides also that informations or complaints before a magistrate or justice of the peace may be made in alternative allegations, though if these are such as to embarrass the defence the Court may order the complainant to strike out one alternative.

Industrial Schools Amendment (No. 14).—This Act, right or wrong, seems on the surface to be the widest departure yet made in British legislation from the older English tradition as to liberty. By it a person, provided that he is already an inmate of an industrial school, may be deprived of liberty from his twenty-first to his twenty-fifth birthday, and thereafter for any number of further periods of four years, for being "morally degenerate" or otherwise not (in the public interest) a fit person to be free from control. Sentences of this character may be passed by any magistrate, but only on the application of the manager of the industrial school at the direction of the responsible Minister.

Native Land (No. 15).—This consolidates, though with some amend-

ments, a number of the Acts which escaped the measures of 1908. They comprise, besides local and private Acts, no less than forty-nine public Acts which have been passed dealing with this subject since 1870.

Stamp Duties Amendment.—No. 17 increases the taxation in respect of race meetings and of certain receipts of racing clubs and race committees. It also increases the duty on bank notes from 10s. to 15s. per £100.

Coal-Mines Amendment (No. 18).—This Act, besides extending the range of compensation for injuries, prohibits employers from requiring of a person applying for employment in a coal-mine any medical examination or medical certificate of health.

Customs Duties Amendment.—No. 21 raises customs and excise duties all round by 1 per cent. of the previous amount of such duties in the case of tobacco, etc., and $2\frac{1}{2}$ per cent. in the case of all other articles. But the effects of the reciprocal treaties with the (then) Colonies of South Africa are not to be disturbed.

Old Age Pensions Amendment (No. 22).—This Act amends some details of the provisions for calculating the income of an applicant for a pension.

Race Meetings (No. 23).—This Act prohibits horse-races except those conducted under the management of clubs licensed for the purpose by the Minister of Internal Affairs.

Magistrates' Courts Amendment (No. 26).—This Act provides, *inter alia*, that the defendant in proceeding in Magistrates' Courts for debt or damages must give notice of his intention to defend, and if he fails to give notice, cannot defend without leave of the Court. Special notice must further be given of the special defences of infancy, coverture, the Statute of Limitations, or a discharge in bankruptcy.

Defence (No. 28).—This Act, as is well known, provides for compulsory military training and imposes a liability to be called up for military service in time of war. The training does not at any period of life demand more of a man than fourteen days in the year in training camp and twelve half-days in the year. On the other hand the training begins at the age of twelve and lasts till thirty. The manner in which the material so provided could be organised in time of war does not appear in this Act.

Reformatory Institutions (No. 30).—Under this Act a person may be committed to an Inebriates' Home by a magistrate upon his own application, upon conviction upon certain charges, and on the complaint on oath of a relative supported by two medical witnesses. The period of detention must not exceed two years, but it must in no case be less than six months, nor, when an offence is proved, less than one year.

Further, upon the conviction of a female over fourteen of an offence such as drunkenness, and upon evidence of habitual profligacy, she may, in addition to any other sentence, be committed for a year to a reformatory of a special class sanctioned by this Act.

Shipping and Seamen Amendment (No. 36).—This Act, which is a consolidating as well as an amending Act, was reserved for the signification of His Majesty's pleasure.

SUPPLEMENTARY LIST OF ACTS.

- Nos. 2, 5 and 6. Supply Acts.
- No. 3. Aid to Public Works and Land Settlement.
- No. 4. Land Tax and Income Tax.
- No. 16. King-country Licences.
- No. 19. Public Works Amendment.
- No. 20. New Zealand Society of Accountants Amendment.
- No. 24. Urewera District Native Reserve Amendment.
- No. 25. Workers' Compensation Amendment.
- No. 27. Gold Duty Amendment.
- No. 29. Land for Settlements Administration.
- No. 31. New Zealand State-Guaranteed Advances.
- No. 32. Public Service Classification and Superannuation Amendment.
- No. 33. Rotoiti Validation Act.
- No. 34. Railways Authorisation.
- No. 35. Appropriation.

10. FIJI.

[*Contributed by* W. F. CRAIGES, ESQ.]

Ordinances passed—26.

Revenue and Public Loans.—No. XVI. amends the Customs Ordinances of 1881¹ and (No. 1.) of 1908.² It provides for (a) production on requisition of the original invoice relating to imports (s. 4); (b) inspection and if need be fumigation or destruction of imported second-hand clothes (s. 5); and (c) the exemption of declared goods for warehouse charges, etc., if they are removed immediately after inspection or examination (s. 2).

Public Works Loan.—No. XXV. authorises the Governor to raise a sum not exceeding £100,000 by loan secured by debentures charged on and payable out of the general revenues and assets of the Colony, issued and registered in London and bearing interest at a rate not exceeding 4 per cent. The proceeds of the loan are applicable to permanent public works approved by resolution of the Legislative Council and sanctioned by the Secretary of State for the Colonies.

Supreme Court.—The Supreme Court Ordinance, 1875,³ permits the

¹ Fiji Ordinances Revised (ed. 1906), p. 347.

² See Journal, N.S. vol. x. p. 354.

³ S. 11 of Ordinance No. VII. of 1875; Fiji Ordinances Revised (ed. 1906), p. 19.

admission to practice in the Colony of barristers and solicitors who have been admitted in the United Kingdom and Australasia. Ordinance No. VII. extends this provision to include barristers and solicitors who have been admitted "in British North America or in any other British Colony which may be from time to time named by order of the Governor in Council."

Jury.—No. VIII. exempts from jury service in criminal trials salaried functionaries of a foreign Government who do not carry on any business and persons holding office in or in the employ of the Pacific Cable Board of the Colony.

Punishment of Young Persons.—No. XIII. adapts to the Colony s. 103 of the Children's Act, 1908, prohibiting sentence of death on a person under sixteen.¹

Companies and Partnerships.—No. XI. prohibits the registration, except by special leave, of a company name containing the words "empire" or "imperial" or any word calculated to give the impression of Government support or connection; and empowers the Registrar, subject to appeal to the Supreme Court, to refuse to register a company if the name proposed is so like that of a registered company as to be calculated to deceive. The Ordinance applies to companies incorporated in Fiji or by the law of England or of any other Colony.

Shipping.—No. X. applies to Fiji ss. 437-43 of the Merchant Shipping Act, 1894² (deck and load-lines), and ss. 1-12 of the Merchant Shipping Act, 1906³ (safety), with the changes necessary to adapt these enactments to the circumstances of the Colony.

No. XII. makes provisions to ensure the careful handling and transport of bananas and other fruit and vegetables when transported for shipment or shipped for export. The Act is enforceable by European officers only. European is defined as "a person who is a member of a European race by birth or is a descendant from ancestors, who were members of a European race without admixture of the blood of any other race" (s. 1 (3)).

No. IX. amends the Pilots Ordinance (No. 12), 1908, by forbidding under penalty the demand by or payment to a pilot in respect of pilotage services of any sum in excess of the rate authorised by law.

Mines.—No. I. amends the Mining Ordinance of 1908⁴ by defining "coal" to mean mineral coal but not to include shale or mineral oil, and providing for regulations as to mining for mineral oils and by altering the regulations as to prospecting licences.

Roads.—No. XIV. makes new provisions as to the constitution of Provincial Road Boards.⁵

¹ See Seychelles Legislation, *supra*, p. 372.

² 57 & 58 Vict. c. 60.

³ 6 Ed. VII. c. 48.

⁴ See Journal, N.S. vol. x. p. 355.

⁵ Superseding ss. 8, 9, of the Roads Ordinance, 1907. See Journal, N.S. vol. ix. p. 434.

Municipalities.—No. XXV. (an Ordinance of 140 sections) consolidates with amendment the law relating to municipalities. It provides for the proclamation of towns, the constitution, election, and proceedings of and finance of town councils; for valuation and the assessment and collection of rates and the duties and powers of the councils as to streets, buildings, sanitation, drainage, and nuisances.

Traffic in Women.—No. XV. provides for the execution in Fiji of the international agreement concluded on May 18, 1904, for the suppression of immoral traffic in women.

Immigrants.—No. XVII. makes regulation for checking the immigration of undesirable persons, viz. destitute immigrants, stowaways, lunatics, persons suffering from contagious, infectious, or communicable disease, persons convicted elsewhere of certain crimes against persons or property, and prostitutes, gamblers, and habitual drunkards (ss. 2, 5). All ships must furnish passenger lists, and no one may land till the visiting officer has given his permission (s. 3). Provision is made for deporting persons who land without the necessary permission (s. 9).

Telephones.—No. XXVI. provides for the establishment of a telephone service as a Government monopoly, and gives the necessary power of entry on lands to set up the service and for its management.

Medical Practitioners.—No. XXIII. amends the Medical Practitioners, etc., Ordinance (VI.) of 1881¹ as to the qualifications necessary for registration as a medical practitioner in Fiji. The Governor is authorised to add to the list in the Ordinance of 1881 colonies, states, or countries not there specified.

Trigonometrical Survey.—No. XXII. gives the powers of entry on land and setting up landmarks, etc., necessary for carrying out a trigonometrical survey of the Colony.

Liquor Prohibition.—No. VI. amends the Liquor Prohibition Ordinance of 1892² by making specific regulations for the case of persons prohibited by a magistrate's order from being on licensed premises or being served with intoxicants. Penalties are imposed on persons who accompany to licensed premises a person whom they know to be prohibited or procure liquor for him or assist him to procure or drink liquor.

Arms.—No. V. amends the Arms Ordinance of 1883³ by adding a definition of immigrant who may not bear arms, and providing for monthly publication a list of persons who have received permits to bear arms.

Animals.—No. XXI. provides for the improvement in the breed of horses and cattle by requiring inspection of animals to see if they are fit for stud purposes, and by licensing the fit and preventing the unfit from breeding.

¹ Fiji Revised Ordinances (1906), p. 344.

² *Ibid.* p. 852.

³ *Ibid.* p. 470.

SUPPLEMENTARY LIST OF ORDINANCES PASSED.

Nos. II., XX. Appropriation.

Nos. III., IV. Native Lands.

No. XVIII. Legitimation on subsequent marriage of parents (not sanctioned).

No. XIX. Steam Whistles in Harbour.

V. SOUTH AFRICA.

I. CAPE OF GOOD HOPE.

[*Contributed by F. G. GARDINER, ESQ., Attorney-General of the Province of the Cape of Good Hope.*]

Acts passed—43.

Damage by Fences.—No. 9 provides that no owner or lessee of land without the limits of a municipality or village management board shall be liable for any damage caused to any person or property coming into contact with any fence on such land, unless such damage has been caused by the negligence of such owner or lessee in the erection or the keeping in repair of such fence.

Labour Colonies.—No. 10 makes provision for the establishment by any person or body legally representative of any charitable organisation, church, etc., of labour colonies for indigent persons or of industrial institutions for the instruction of the children of indigent persons or of destitute children. When the Minister to whom the administration of the Act may be assigned is satisfied as to the conditions under which a labour colony is to be founded and conducted, he may proclaim it as constituted under the Act. Certain principles must be embodied in the constitution of every labour colony under the Act, one of these being that provision must be made for the compulsory attendance at school of all children of such colony between the ages of seven and fourteen, unless they be engaged in a regular occupation and have passed the fourth standard. The Governor may, with the consent of Parliament, make grants of land to labour colonies or industrial institutions. Loans may be made out of funds provided by Parliament for the purposes of acquiring land or carrying out works connected with the establishment or development of a colony or institution, provided that at least one-third of the total expenditure in each case be provided from other sources. The Act enables the Governor to raise a loan not exceeding £50,000 for the purpose of carrying out its provisions. Destitute children, as defined by Act 24 of 1895 (as amended by

this Act), may be sent to an industrial institution. The term "indigent person" in the Act is confined to British subjects.

Game.—No. 11 consolidates and amends the Game Laws, 1886 to 1908.¹ Special protection is provided for "royal game" such as elephants, rhinoceroses, etc.

Cigarette Tax.—No. 12 levies and authorises the collection by means of stamps of a tax on cigarettes, at the rate of $\frac{1}{2}$ d. per half-ounce. The stamp has to be affixed on the package containing the cigarettes and cancelled, and the sale of cigarettes by retail unless enclosed in some package or other enclosure and duly stamped is penalised. A licence of £1 per annum is required for the manufacture of cigarettes for the purpose of sale.

Prevention of Corruption.—No. 13 deals with the bribing of agents. It follows closely the wording of the Imperial Act, 6 Ed. VII. c. 34.²

Shipping.—No. 14 enables the Government, as controllers and managers of certain harbours, to detain goods on receipt of notification from a ship-owner that his freight thereon is unpaid. In case the freight is not released, paid, or deposited with the Government to abide the result of legal proceedings, the Government may after the expiration of a certain time sell the goods, and apply the proceeds to the payment of customs duties, expenses of sale and rent charges, and of the amount of the freight claimed by the shipowner.

Ballot.—No. 15 provides that all elections of members of divisional councils, municipal, borough or town councils, shall be by ballot.

Stamps and Licences.—No. 16 makes certain alterations in the law relating to licences for agents of foreign firms and for commercial travellers, and in the law relating to the patent medicine stamp duties. Officers of revenue, excise, or customs are authorised to enter business premises for the purpose of ascertaining whether the provisions of the Stamp Laws are complied with.

Liquor Law.—No. 17 entrusts to municipal councils the power to grant licences for the sale of light wines—*i.e.* natural wines the produce of any British South African Colony the alcoholic strength of which does not exceed 14 per cent. in volume.

Criminal Law.—No. 18 enacts, *inter alia*, that where a person is sentenced to a fine or in default of payment to imprisonment, and he pays a portion of the fine, the term of imprisonment shall be reduced proportionately. Provision is also made that where a magistrate forwards the record in a criminal case for review by a judge, he shall send with it any written statements or arguments which the accused may desire to append.

Mission Stations and Communal Reserves.—No. 29 provides for the creation of boards of management for those mission stations and communal reserves to which the Act by proclamation is applied. Before issuing such proclamation the people affected must be consulted, and, in the case of mission stations, the written consent of the trustees must be obtained. The

¹ See Journal, N.S. vol. ix. p. 453.

² See *Legislation of the Empire*, vol. i. p. 135.

board of management is given control over the land in a station or reserve, excluding, in the case of a mission station, land occupied by the society itself. Registers of occupiers of lots have to be framed by the Board, and certain rating powers are given to the Board in respect of such lots. No lot may be alienated without the consent of the Governor, and provision is made, in the case of the death of the occupier, to prevent sub-division of a lot amongst his heirs or legatees. Where ordinarily such lot would come to be sub-divided, the magistrate, after consultation with the board, has to appoint one person from among those beneficially interested in the lot to be the occupier, provision being made for payment by such appointee of compensation to the other beneficiaries. No liquor licence may be granted within the area of jurisdiction of a board of management.

Trading Stations in Native Locations or Reserves.—No. 30 enables the Governor to grant permission to occupy a site for a trading station upon Crown land occupied entirely by natives. This permission conveys no ownership, and the right to occupation may not be transferred without the consent of the Governor.

Native Locations.—No. 32 consolidates and amends the law with regard to private native locations.

Protection of Children.—No. 35 makes further provision for the protection of children on the lines of ss. 1 (1) and 2 (a) of the Imperial Act, 4 Ed. VII. c. 15. Failure on the part of a parent or other person legally liable to maintain a child to provide adequate food, clothing, medical aid, or lodging is deemed to be neglect. Provision is made for medical inspection of children in public elementary schools and for the cleansing of the person or clothing of any such child when deemed necessary.

Fencing Loans.—No. 37 enables the Governor to make loans to owners or occupiers of land, not being public bodies such as divisional councils, for the purpose of erecting jackal-proof fences.

Irrigation.—No. 40 allows a riparian owner on a perennial stream to impound and store, for purposes of irrigation, or, subject to existing rights and with the permission of the Water Court, for generation of power or for industrial or mining purposes, a reasonable share of such water as there may be in excess of the normal flow of such stream. What is the normal flow is a matter for the determination of the Water Court.

Excise.—No. 42 alters the excise duty so as to reduce the excise on wine brandy to one-half of that charged on other spirits.

Cattle Cleansing.—No. 43 makes further provision in respect to the cleansing of tick-infested cattle. It enables divisional councils, municipalities, and village management boards to incur expenditure in constructing and maintaining cattle-dipping tanks.

2. NATAL.

[Contributed by J. W. F. BIRD, Esq., I.S.O., *Attorney-General of the Province of Natal.*]

Acts passed—44.

Native Administration.—Act No. 1 creates new organisations for the more effective administration of government among the native population. The Colony is divided into four districts, each of which is placed under the control of a District Native Commissioner, whose principal duties are to advise and assist natives, to attend meetings of chiefs, and keep the Government informed through the Secretary for Native Affairs of all matters of importance relating to natives.

A council is constituted to consider and advise upon all legislation and laws affecting natives. The members consist of the Secretary for Native Affairs, who is constituted as a permanent officer, subordinate to the Minister for Native Affairs, the four District Native Commissioners, and four non-official members chosen by the Governor in Council by reason of their knowledge of natives and their affairs.

The Act also defines with greater detail than in the existing Code (Law No. 19, 1891), but without any alteration in principle, the authority of executive officers in relation to native administration.

Union of South Africa (Referendum).—No. 2 was an Act passed to test the feeling of the Colony by means of an electoral ballot with regard to the acceptance or not of the proposed South African Union.

Railways.—The Alfred County Railway Act (No. 6) empowers the construction by Government of a narrow-gauge railway from South Shepstone to Murchison Flats, on the Pondoland border of Cape Colony.

Act No. 7 is an amending Act to exempt Government from payment of security under the Lands Clauses Consolidation Law, No. 16, 1872, when undertaking the construction of railways and other works authorised by the legislature.

Criminal Law.—An amending Act (No. 9) raises the age of consent in relation to criminal intercourse from fourteen to sixteen years.

Carnal knowledge of a girl over fourteen and under sixteen years is made punishable with imprisonment not exceeding two years, with or without flogging not exceeding twenty-five lashes. In the event of evidence *aliunde* as to age being wanting, the jury or Court may decide such question by the appearance of the girl.

Estate Duty.—Act No. 10 provides for payment of duties in respect of the administration of intestate estates of Indian immigrants.

Transfer Duty.—Act No. 11 fixes the date for the purposes of transfer duty on which a change of proprietorship or the vesting of an inheritance takes place.

Act No. 12 exempts leases from the Crown from transfer dues on registration thereof in the Public Registry of Deeds.

Renunciations in Bonds.—Act No. 13 amends Law No. 40, 1884, by providing that the *beneficia* available to women signing surety bonds, which hitherto could only be validly renounced before an official in Natal, may now be renounced before an advocate, attorney, or notary public anywhere in South Africa, and elsewhere before a Commissioner of the Supreme Court of Natal.

Exotic Animals and Animal Products.—Act No. 15 prohibits the importation of bees and the unmanufactured products of apiculture and zoological specimens except with the consent and subject to conditions prescribed by the Minister of Agriculture. Offences are punishable by a fine not exceeding £100, or in default of payment imprisonment with or without hard labour for a term not exceeding six months.

Administration of Estates.—Act No. 16 amends the law with regard to administration of estates and succession duty. The Master of the Supreme Court is substituted for the Registrar of Deeds as the officer to issue letters of administration. Before doing so he is to require security for payment of succession duty, and no transfer of land from the estate of a deceased person is to be registered unless the Master has given a certificate that succession duty is paid. Succession includes gifts within twelve months before death.

Penalties are imposed for neglect to give information and delay in paying succession duty.

Stamp Duty.—Act No. 17 exempts the Natal Native Trust and Zululand Native Trust from stamp duty upon grants of land.

Natal University College.—Act No. 18 provides for the establishment of a University College to be controlled by a Council and fixes the constitution and powers thereof.

Magistrates' Courts.—Act No. 21 amends the Magistrates' Courts Act authorising the imprisonment of debtors for disobedience of an order of Court by providing that upon payment of the debt the debtor may at once be released notwithstanding that sentence has not expired, except in cases of fraud, and in the same way the magistrate may order sentence to be suspended to give the debtor an opportunity of discharging the debt in the interval.

Licences.—Act No. 22 construes Act No. 18 of 1897 relating to licences as applying to all licences of the nature of licences for wholesale or retail business, including shop licences issued in municipal boroughs or townships, and gives to parties in an application for the renewal of a licence a right of appeal to the Supreme or to the Circuit Court.

Whipping.—Act No. 23 provides for the punishment of boys by whipping for minor offences, the intention being to avoid as much as possible boys being brought into contact with gaol-life and surroundings.

Finance.—Act No. 25 authorises a loan of £370,000 for the construction of railway and harbour works and other public works of a permanent nature.

Gambling.—The object of Act No. 31 is to stop gambling under the device of building or loan societies in which an advance of money is made by ballot or lot without security for repayment. Also to put an end to the offering of prizes in connection with the sale of cigarettes, tobacco, and liquor.

Protection of Wild Animals.—Act No. 33 forbids the export of elephants' tusks under 11 lb. in weight and imposes a duty of 20 per cent. on the export of horns, hides, etc., the object being to discourage the wholesale destruction of certain game such as elephants, rhinoceroses, hippopotami, etc.

Accountants.—Act No. 35 provides for the registration of accountants and the incorporation of a Society of Accountants in Natal.

Railway Employees.—Act No. 32 permits the railway employees who took part in the strike of 1909 to bridge over the period of non-employment so occasioned for the purposes of the Public Employees' Superannuation Fund, which requires continuous employment.

Church Union.—Act No. 36 provides for the unification and amalgamation of churches holding the same creed as the Dutch Reformed Church and for the devolution of the civil rights conferred by law on those bodies.

Civil Servants.—Act No. 44 provides for the refund, under certain conditions, of superannuation deductions to women who have served for at least six years in the civil service and leave for the purpose of being married.

3. ORANGE RIVER COLONY.

[Contributed by W. R. BISSCHOP, ESQ., LL.D.]

Ordinances passed—42.

Liquor Licences.—No. 3 amends the Ordinance relating to the possession of liquor by coloured persons, No. 8 of 1903.¹

No. 4 renders certificates of analysis of alcoholic liquor admissible in evidence.

Parliament.—No. 5 defines the period of prorogation of Parliament.

Administration of Justice.—No. 6 extends the jurisdiction of special justices of the peace.

No. 14 provides for the admission as advocates in the Orange River Colony, without any further preliminary examination, of British subjects who have obtained the degree of "Doctor of Modern Roman-Dutch Law" at any recognised university.

¹ Journal, N.S. vol. vi. p. 402.

Prisons.—No. 17 repeals the Prisons Ordinance, No. 3 of 1903,¹ and enacts afresh the law relating to prisons.

The prisons are divided into two classes, viz. gaols and lock-ups. These are under the supervision of an Inspector of Prisons, appointed by the Governor, who also appoints all officers of gaols other than warders and members of the police force. All warders are appointed by the Minister to whom the controlling management of prisons has been assigned.

Provision is made for the reception of prisoners into custody in gaol, the detention of prisoners in lock-ups, the performance of hard labour, and the circumstances under which lock-ups may be used as gaols.

Male and female prisoners shall be kept separate, as well as white and coloured persons. Gaolers are not allowed to punish prisoners; such punishment belongs entirely to the jurisdiction of the magistrates. No prisoner shall be placed in irons, or be subject to any other means of forced restraint, unless (1) for violent conduct, escape or attempting to escape; or unless (2) there is reason to suspect that the prisoner is attempting to escape; or unless (3) the medical officer shall, in writing, advise such restraint.

Rules are made for the prevention of escape of prisoners, for the trial of prisoners for the contravention of regulations, the procedure to be followed being the same as that in the Courts of the Resident Magistrates, but the trial to be held within the gaol. Sentences of the magistrates shall be subject to review by the judges of the High Court.

Every other offence committed by prisoners shall be dealt with by the Resident Magistrate in his own Court.

Penalties are set out for offences committed by persons other than prisoners, *e.g.* for aiding a prisoner to escape, or attempting to escape, for conveying letters or forbidden articles to prisoners, etc.

The Governor is authorised from time to time to make, alter, and rescind regulations not inconsistent with the provisions of the Prisons Act, or on such subjects as are set out in the Act. The Governor may also from time to time by Proclamation constitute any gaol or portion of a gaol as a reformatory for the detention of juvenile offenders under the provisions of the Juvenile Offenders and Apprenticeship Ordinance, No. 5 of 1904,² and to make regulations providing for the use of such reformatories.

No. 22 extends the jurisdiction of Resident Magistrates in civil cases by increasing the pecuniary limits mentioned in the Magistrates' Court Ordinance, No. 7 of 1902.³

No. 27 amends s. 17 of the Administration of Justice Ordinance, No. 4 of 1902,³ by extending to certain legal practitioners the opportunity of qualifying as conveyancers.

Animals.—No. 7 authorises the Governor from time to time, by Proclama-

¹ Journal, N.S. vol. vi. p. 401.

² Journal, N.S. vol. vii. p. 169.

³ Journal, N.S. vol. v. p. 383.

tion in the *Gazette*, to prohibit the introduction into the Orange River Colony, and to regulate the disposal, of exotic animals.

Public Health.—No. 9 again postpones the coming into force of the general operation of the Public Health Ordinance, No. 31 of 1907.¹

Natives.—No. 12 provides for the establishment, licensing, and regulation of eating-houses and lodging-houses in locations and native reserves. The granting of licences shall be in the absolute discretion of the Colonial Secretary, after consultation with the town council, board of management, or other managing body (if any) of the community wherein the location is established.

Municipalities.—No. 13 amends the Bloemfontein Municipal Ordinance, No. 35 of 1903,² and the Municipal Corporations Ordinance No. 6 of 1904.³

No. 15 repeals Law No. 6 of 1894, and amends the law relating to the foundation of townships. The mode of procedure includes the appointment by the Commissioner of Public Works of a Commission of Inquiry, after the receipt of an application from the owner of a farm for the laying out of a township on such farm. The Commission shall, at the expense of the applicant, visit such farm and investigate the application. On their recommendation the application may be granted, and the applicant shall then submit to the Surveyor-General a plan showing the proposed design of the township. After approval, the applicant shall have the farm surveyed, and after survey forward to the Surveyor-General a general plan of the township for registration.

After certain portions of the land (as town lands, streets, lanes, squares, etc.) have been transferred to the Governor, the township shall be proclaimed and the *erven* be sold. All expenses shall be paid by the applicant, who shall furnish accounts of proceeds of sale of *erven* to the Surveyor-General.

The laying out of townships without permission is rendered subject to a fine.

Weeds.—No. 23 makes better provisions for the eradication of noxious weeds, and is similar to the Noxious Weeds Act, No. 12 of 1909, of the Transvaal.⁴

Agriculture.—No. 24 provides for the establishment of a Central Agricultural Society for the advancement and improvement of agriculture, and the holding of a Central Agricultural Show every year in the Colony. The general control of affairs is placed in the hands of a Central Board. This Board shall be composed of (a) twenty-five members elected annually from their number by the members of the Society; (b) one representative to be appointed annually from each of the agricultural societies of the Colony formed under the provisions of the Agricultural Act, No. 24 of 1908⁵; (c) one

¹ Journal, N.S. vol. ix. p. 464.

⁴ Cf. p. 426.

² Journal, N.S. vol. vi. p. 405.

⁵ Journal, N.S. vol. x. p. 366.

³ Journal, N.S. vol. vii. p. 171.

representative annually appointed from any and each agricultural society in British South Africa outside the boundaries of the Colony; and (d) two persons appointed by the Government to hold office so long as the Governor shall deem fit.

Rules are set out for the election and appointment of representatives on the Board; the annual meetings of the Board; the election of the Chairman and the Committee, and the position of the Committee; the appointment of Treasurer and Secretary; the articles of association, and regulations; the annual subscription; the property, business, and local representation of the Society; the subsidy of the Society, and the annual contribution by the Government; the special contribution by the Government for prizes in the district of Bloemfontein; and the formation of a central union of agricultural societies in the Colony.

Irrigation.—No. 31 provides for the establishment and approval by the Government of the Colony of irrigation settlements, and to assist private irrigation schemes. For the purpose of establishing irrigation settlements and townships in connection therewith, the Governor shall be authorised to acquire land by expropriation under the provisions of the Expropriation of Lands and Arbitration Clauses Act, No. 11 of 1905,¹ and to set apart for such purposes any land which is the property of the Crown, and has not yet otherwise been disposed of according to law. The Governor shall further be entitled to sub-divide such land into separate holdings, and to dispose of the same by lease, sale, or in any other manner and under such conditions as may be prescribed by regulations framed by the Governor from time to time in that behalf.

For the benefit of these holders the Commissioner of Works, Lands, and Mines shall be authorised to impound, divert, take, and use from any river or watercourse and to convey, in accordance with the provisions of the Right of Passage and Water Ordinance, No. 10 of 1906,² to such settlements such a supply of water as may be required for the irrigation of these settlements, for the watering of stock, and for the domestic uses of the inhabitants thereof. Provisions may be made at the same time to prevent interference by riparian proprietors against such supply of water. As a rule no compensation shall be given to any riparian proprietor for the taking of such water unless the taking of the water would interfere with his own irrigation.

Works are prohibited which would diminish the supplying of water to the separate reservoirs of settlements.

The Governor may apply to these settlements the provisions of Ordinance No. 4 of 1907 (private),³ relating to the election of committees of management, the powers and duties of such committees, and the framing of regulations therefor. Pending the establishment of such committee the Governor may make regulations, and in addition to the regulations made by the committee the

¹ Journal, N.S. vol. vii. p. 488.

³ Journal N.S. vol. ix. p. 465.

² Journal, N.S. vol. viii. p. 357.

Governor shall be authorised to make further regulations on the subject set out in the Act.

The Governor may apply the provisions of the said Ordinance, No. 4 of 1907, to private settlements which have obtained his approval. With regard to these private settlements any landowners who shall have constructed any reservoirs of which the water encroaches on the land of his neighbouring farm shall have the right to use such land for the storage of water provided no cultivated land or buildings be thereby interfered with and provided he pays reasonable compensation for the use thereof.

Scab.—No. 32 repeals Ordinance No. 14 of 1903,¹ No. 12 of 1905,² No. 26 of 1906,³ and provides fresh regulations for the eradication of scab in sheep and goats.

Agricultural Loan Fund.—No. 33 establishes and regulates the administration of a Land and Agricultural Loan Fund. The Treasurer shall place at the disposal of a Board consisting of himself and four other residents of the Colony appointed by the Governor a sum of £500,000 out of any loan raised under the Orange River Colony Public Loan Act, No. 40 of 1908,⁴ in order to thus create a Loan Fund.

Out of that fund the Board may from time to time make advances, either by granting short-dated loans on real or personal security, or loans for longer periods and higher amounts on real security.

The purposes for which the loans may be given include the following :

- (1) to pay off existing liabilities on land ;
- (2) to effect improvements by water power ; fencing ; planting orchards ; erecting farm buildings ; blocking sluits, dongas and watercourses, etc. ;
- (3) to pay costs incidental to the sub-division of land held in undivided shares ;
- (4) for the purchase of livestock, plant and machinery for agricultural purposes ;
- (5) for the purchase of land for agricultural purposes.

Short advances of sums not less than £50 and not exceeding £200 may be granted to applicants who are unable to furnish the security of first mortgage on immovable property, on personal suretyship of two landowners and on such terms as may be laid down under regulations from time to time to be made by the Governor on the recommendation of the Board.

Advances to recognised agricultural and irrigation settlements may be made on such terms and under such circumstances and conditions as may be set out under regulations to be fixed by the Board in accordance with the provisions of Art. 38 of the Act.

All other advances shall only be made on the security of a first mortgage on immovable property, not being within the limits of any municipality,

¹ Journal, N.S. vol. vi. p. 404.

² Journal, N.S. vol. vii. p. 488.

³ Journal, N.S. vol. viii. p. 59.

⁴ Journal, N.S. vol. x. p. 363.

proclaimed village, or township, and such advances shall be granted for no less an amount than £50, nor for a larger amount than £1,500. For purposes of irrigation schemes, in special cases, the Board may make advances not exceeding £3,000. In no case an advance on the security of mortgage of immovable property shall exceed 70 per cent. of the actual value of the immovable property whereon it is secured.

Every loan made under this Act shall be repayable by yearly or half-yearly instalments of principal and interest within a period of twenty-five years, unless the Board may deem fit to determine that a loan shall be repayable within a shorter period on conditions to be fixed by the Board.

Special provisions are made for the repayment of principal beyond the amount of half-yearly instalments and for the recovery of loans in default of payment of instalment and interest.

The rest of the provisions regard the administration of the fund, the mode of preparing the mortgage deeds, the regulations to be made by the Board, the audit of accounts, the offences committed under the Act, the duties and powers of the Board in respect of other funds, and the regulations to be made in respect of the administration of such funds. In the first schedule the covenants are set out to be implied in every mortgage on the part of the person executing the same as mortgagor in favour of the Treasurer.

Vaccination.—No. 25 amends the Vaccination Ordinance, No. 29 of 1903,¹ this Act to be read together with that Ordinance. Certain areas are declared exempt from the compulsory vaccination clause, and others may from time to time be declared by Government proclamation to be unexempted areas in the meaning of this Act. All children in an unexempted area shall be periodically visited at the instigation of the Colonial Secretary by district surgeons, and, if any pupils in such area attending school are found to be unvaccinated, the district surgeons are authorised to vaccinate such pupils on the spot. In exempted areas vaccination shall be voluntary.

Nevertheless, parents who live in the unexempted areas may deliver a declaration in writing and on oath made by them to the Resident Magistrate, to the effect that they conscientiously believe that vaccination would be seriously prejudicial to the health of their child, and such declaration shall exempt these parents from penalties for not having their children vaccinated.

Leprosy.—No. 26 repeals Part IV. of Law No. 31 of 1899 and amends the law relating to leprosy. Notice that anybody is suffering from leprosy must be given to the magistrate, who shall cause the alleged leper to be examined by two registered medical practitioners. If, upon their report, the magistrate is satisfied that the alleged leper is suffering from leprosy, a summary reception order may be issued by him directing that the patient shall be removed and detained in a leper hospital. Such summary reception order shall be of effect for one month. Within that time the magistrate

¹ Journal, N.S. vol. vi. p. 404.

shall, without delay, transmit two copies of his order to the medical officer of health in the Colony, who will make such further inquiries and investigations as he may deem fit. The medical officer of health shall lay all documents, together with his own report, before the Attorney-General, who again shall place the reports and other documents before a judge in chambers.

The judge, in considering the case, shall decide whether the patient shall be permanently detained in the leper hospital or shall be discharged.

The Governor is authorised to make, alter, or repeal regulations connected with the leper hospitals and the treatment of lepers.

Co-operative Societies.—No. 28 authorises the Governor to exempt companies established for co-operative purposes from certain provisions of the law relating to joint-stock companies. Such societies shall thereafter be exempt from the said provisions to the extent and subject to the modifications mentioned in the notice of exemption. Nevertheless, if any were already registered, such societies might remain registered as joint-stock companies.

Closing Time.—No. 30 regulates the closing time of shops in towns and villages. The Act obliges every shopkeeper within the limits or area of any municipality or village management board, within one month, to elect a time for the closing of shops, provided that the hour elected be not later than 7.30 p.m. At the expiration of one month the local authority shall notify in the *Government Gazette* the hour which has been elected by the majority of shopkeepers in their locality, and thenceforth such hour shall be the closing hour in that locality. If no clear majority has been obtained the local authority itself shall fix the closing hour. At such selected hour all shops shall be closed and no shopkeeper or his employees shall be entitled after such hour to sell any goods, or offer any goods for sale, or admit customers to his place of business.

Chemists' shops and shops of general dealers who hold a certificate under s. 50 of Ordinance No. 1 of 1904¹ shall not be forbidden to sell medicines or surgical appliances in urgent cases after a specified closing hour.

The closing hour on Saturdays shall be 9.30 p.m., and all shops shall be closed altogether on public holidays.

No assistant shall be employed for more than fifty-four hours, meal hours excepted, in any one week in any one shop, and no shop shall be opened before the hour of five o'clock in the morning.

Local Loans.—No. 34 establishes a fund for granting annuities to persons who were wounded, and the widows and orphans of persons who were killed, during the late war, and for providing bursaries for certain educational purposes.

¹ Journal, N.S. vol. vii. p. 168.

Railways.—No. 35 provides for the construction in the Orange River Colony of a railway from Sanna's Post to Wepener.

No. 36 provides for the construction by the Railway Board in the Orange River Colony of a railway from a point on the railway line between Bethlehem and Harrismith to a point near the town of Villiers on the Vaal River, and thence to a point on the Germiston-Volksrust line in the Transvaal.

No. 40 provides for the construction by the Railway Board of a railway from a point at or near Standerton on the Germiston-Volksrust line to a point on the Klip River in the Transvaal, and thence to the town of Vrede in the Orange River Colony.

Expropriation of Land.—No. 37 provides for the expropriation of land required by the Government for police or school purposes other than land exempted from expropriation under Clause 3 of the Act.

Provision is made for compensation for such expropriation to be agreed upon between the owner and the Commissioner of Public Works, Lands, and Mines, or, failing such agreement, to be determined by arbitration.

Pensions.—No. 39 provides pensions and gratuities for certain officers of the late Orange Free State, and otherwise to interpret and amend the Pensions Ordinance, No. 23 of 1904.

Finance.—No. 1 amends the Orange River Colony Public Loan Act, No. 40 of 1908,¹ in some minor respects, and is extended by No. 16.

No. 2 amends the Transvaal Guaranteed Loan (Assumption of Part Liability) Act, No. 16 of 1908.²

No. 8 applies a sum not exceeding £400,600, on account, for the service of the year ending June 30, 1910.

Nos. 10 and 21 provide out of the Treasury balances for extraordinary expenditure on certain works and other services.

No. 11 applies a further sum not exceeding £39,377 for the services of the year ending June 30, 1908.

No. 19 provides a sum not exceeding £944,355 for the public service of the Colony for the year ending June 30, 1910.

No. 20 provides a further sum not exceeding £21,740 for the public service of the Colony for the year ending June 30, 1910.

No. 41 applies a further sum not exceeding £974 7s. 7d. for the service of the year ended June 30, 1909.

No. 42 provides certain moneys for the purpose of defraying the cost of railway construction in the Orange River Colony.

Errors in Laws.—No. 18 corrects certain errors in such Acts as are mentioned in the schedule.

¹ Journal, N.S. vol. x. p. 363.

² Journal, N.S. vol. x. p. 362.

4. TRANSVAAL.

[Contributed by W. R. BISSCHOP, Esq., LL.D.]

Statutes passed—37. One Private Act (No. 38).

Opium.—No. 4 amends the Opium Trade Regulation Ordinance, No. 25 of 1906,¹ and further regulates the purchase, sale, and possession of opium.

Medicine, Dentistry, and Pharmacy.—No. 5 further amends the Medicine, Dentistry, and Pharmacy Ordinance, No. 29 of 1904,² by providing fresh regulations as to the conduct of elections for the Medical Council of the Pharmacy Board, and by entitling British subjects (born or domiciled in any colony or territory of British South Africa, who are proceeding outside South Africa for the prosecution of their studies, and who are holders of a diploma or certificate granted after examination by any university or state examining Board whose curriculum and standard of examination required for such degree, diploma, or certificate is not lower than that prescribed by the General Council of Medical Education and Registration of the United Kingdom) to make application for registration as a medical practitioner or dentist in the Transvaal.

Bees, Honey, and Beeswax.—No. 6 regulates the importation of bees, honey, and beeswax into the Transvaal, by prohibiting the importation thereof altogether from any place outside South Africa, and of used bee-hives or used bee-hive accessories or appliances or anything which have been used to contain or manipulate bees or beeswax and by prohibiting the exportation thereof from any place whatever without special permission of the Department of Agriculture. It further authorises the Agricultural Department to inspect any consignment of bees imported as aforesaid, and any apiary and honey or beeswax which is intended for sale, and any consignment reasonably suspected of containing anything in contravention of the Act; and to cause to be cleaned, disinfected, or destroyed any apiary (if disease is found to exist therein) and bees and beeswax imported in contravention of this Act.

The Governor shall be authorised to make regulations for the carrying out of these provisions; and the prohibition of imports shall not apply to such territories or colonies of South Africa where reciprocal treatment exists regarding this subject.

Irrigation.—No. 7 amends the Irrigation Act No. 27, of 1908,³ by fixing the point where the right to use water of a public stream begins and ends.

Administration of Justice.—*Inquests.*—No. 8 repeals the Inquest Proclamation, 1901,⁴ except for the purposes of those provisions of the Workmen's

¹ Journal, N.S. vol. viii. p. 361.

² Journal, N.S. vol. vii. p. 179.

³ Journal, N.S. vol. x. p. 376.

⁴ Journal, N.S. vol. vi. p. 305.

Compensation Act, 1907,¹ to which that proclamation was applicable, and for the purposes of such inquests as are referred to in the Prisons Act, No. 8 of 1908.² It further amends the existing regulations, and also Ordinance No. 19 of 1906.³

Criminal Law.—No. 38 provides for the prevention, suppression, and punishment of offences against public decency and honour; offences in regard to dangerous performances and acts; offences by keepers of places of public resort; the divulging of secrets or confidential information by public servants; the publishing by newspapers of evidence of indecent character.

The Act also amends in certain respects the law relating to the detention of persons convicted of certain crimes (which are set out in the schedule), the Criminal Procedure Code, 1900, Part VIII., the Prisons and Reformation Ordinance, No. 6 of 1906.⁴ It further provides for the establishment of industrial schools for children. In these schools may be detained children under the age of eighteen years who are found wandering, and have no home or settled place of abode, or are found destitute, or have their parents or parent in prison, or are under the care of parents or guardians of criminal or drunken habits, or whose parents have been convicted of certain offences, and of frequenting the company of reputed criminals; or children who cannot be controlled by their parents, or who are living under circumstances calculated to cause or encourage the seduction of the child; or who are—whilst under the age of fourteen years—found in any public place begging, or singing, performing for money or any other remuneration, or who fall within the provisions of ss. 11 or 12 of the Criminal Law Amendment Act of 1908.⁵ Such children may be sent to any Government industrial school by order of a judge or a resident magistrate, at the instance of any person or of any society working for the reclamation of children. Any child lawfully sent to such an industrial school shall not leave the same previously to its attaining the age of eighteen years except by order of the Attorney-General upon the recommendation of the Board of such school.

The Attorney-General may—instead of sending the child to such an industrial school—authorise the placing of such child in the custody of any person in charge of a charitable institution. The child's parents or guardians may be compelled to contribute towards the child's maintenance to such an industrial school or institution.

Railways.—No. 10 approves and provides for the construction and acquisition by the Railway Board of the lines of railway mentioned in the schedule which are situate in the Transvaal Colony (among them the so-called Selati Railway), and authorises the Transvaal Government to advance certain moneys to that Board for that purpose.

¹ Journal, N.S. vol. ix. p. 469.

⁴ Journal, N.S. vol. viii. p. 360.

² Journal, N.S. vol. viii. p. 360.

⁵ Journal, N.S. vol. x. p. 371.

³ Journal, N.S. vol. viii. p. 363.

Agriculture.—No. 12 makes better provisions for the eradication of noxious weeds by owners, occupiers, and possessors of land, and gives power to the Governor to make regulations for such purpose.

Co-operative Agricultural Societies.—No. 21 amends the Co-operative Agricultural Societies Act, No. 17 of 1908,¹ by providing, *inter alia*, that prior to registration each society shall transmit a list of all its members, containing their names, addresses, occupation and true signature, to the Registrar of these Societies, and of all changes that may occur in such lists.

Marriages.—No. 13 amends Arts. 1, 2, 3, 6, and 10 of Law No. 3 of 1871, and validates certain marriages solemnised by the Consul-General of the Netherlands between September 1900 and July 1909, acting under the authority of the First Volksraad resolution of September 10, 1896.

Natives.—No. 18 provides for the issue of passes to natives within European areas and for such other purposes as are incidental thereto.

Labour.—No. 20 establishes a Department of Labour to aid in the prevention of strikes amongst employees or lock-outs by employers, and to make provision for the settlement of industrial disputes by conciliation after investigation. The provisions of the Act regarding strikes, lock-outs, and conciliation apply to the mining industry, any undertaking carried on by a local authority for the supply of gas, electric light, water, or power, or for tramway or sanitary services, and to such other undertakings as the Governor deems it necessary that it should apply.

The Department shall be administered by the Inspector of White Labour under supervision of the Minister of Mines. In case any industrial dispute arises between an employer and his employees which cannot be settled amicably, application may be made by either party to the Inspector of White Labour for the appointment of a board of conciliation and investigation. Such board shall consist of three members, two to be nominated by either party and the third by the two members so appointed, or—if they fail to do so—by the Inspector of White Labour. Two or more applications may be referred to one board, and in such case the Minister of Mines may extend the number of members of the board to five, seven, or nine members. All expenditure in connection with such board is to be paid out of the general revenue of the Colony.

The board shall hold its meetings in the vicinity of the premises in which the dispute has arisen. Its meetings shall be held in public, unless on application or on its own motion it shall determine to hold any part of such proceedings in private, and decisions shall be taken by majority of votes. The board shall have power to summon and examine witnesses, to order the production of documents, to enter or cause to be entered any premises in connection with the dispute, and to employ assessors and experts.

¹ Journal, N.S. vol. x. p. 375.

The board shall use its utmost endeavours to settle the dispute, and parties may agree to be bound by the recommendations of the board. In such case such recommendation may be made a rule of Court under s. 17 of the Arbitration Ordinance, 1904,¹ and be enforced as provided by that section. If a settlement be arrived at, a memorandum of settlement shall be drawn up by the board and transmitted to the Minister of Mines. In case no settlement be effected, the recommendation of the board shall be submitted to the Minister. Both memorandum and recommendation shall be published.

Punishments are imposed against the offering and accepting of bribes and other offences against the Act.

Rand Water Board.—No. 22 amends the Rand Water Board Statutes, 1903 to 1906,² by providing, *inter alia*, the contributions by the holders of mining titles and local authorities to meet interest and redemption of Rand Water Stock, the means for recovery from the mines of contributions levied on tonnage crushed, and from local authorities of such contributions as are payable by them.

Representation.—No. 23 makes provision for the election of councillors of the municipalities of Johannesburg and Pretoria and such other municipalities as the Government may from time to time declare, in accordance with the principle of proportional representation.

Elections shall be triennial, and with a view to these elections, a voters' roll shall be prepared in March of every year, the first elections to be held in October 1911. The voting shall be by ballot. Each ballot-paper shall contain the names of all the candidates, and the voter shall place in the space opposite the name of each candidate the numerals 1, 2, 3, etc., in the order of his preference.

The candidates shall be declared elected in accordance with the votes so recorded among them.

Children.—No. 24 makes provision for the better protection of the lives of infant children under the charge of persons, apart from the children's parent or parents, for the purpose of nursing or maintaining such infant. Notice in writing of the infant's receipt, removal, or death shall be given to the magistrate of the district by any person receiving such infant. On receipt of any such notice the magistrate may take such measures as he may deem desirable in the infant's interest. For such purpose any field-cornet may from time to time visit and inspect any infant to whom the Act applies, the magistrate may appoint inspectors and visitors and order the medical examination of any such infant. Obstruction of inspection or examination of an infant and ill-treating or neglecting an infant shall be criminal offences under the Act. Relatives within the fourth degree and legally constituted guardians of an infant are exempted from the provisions of this Act.

¹ Journal, N.S. vol. vii. p. 177.

² Journal, N.S. vol. vi. p. 416, and vol. viii. p. 364.

Registration of Deeds.—No. 25 repeals the Deeds Proclamation, No. 10 of 1902,¹ and its Amendment Ordinance, No. 65 of 1903,² the Registration of Prospecting Contracts Ordinance, No. 11 of 1904,³ s. 1 of the Town Lands Amendment Ordinance, No. 2 of 1905,⁴ the Mining Titles Registration Act, No. 29 of 1908,⁵ and ss. 57 and 58 of the Townships Amendment Act, No. 34 of 1908.⁶ It further consolidates the law regulating the Deeds Office and Mining Titles Registration Office and the law relating to the Registration of Deeds and Mining Titles.

Fencing.—No. 26 amends the Fencing Act, No. 12 of 1908,⁷ and Part II. of Ordinance No. 38 of 1904,⁸ *inter alia*, by including natives in the expression "owner," and by making special provisions relating to the repayment by settlers of the cost of erecting fences under the latter Ordinance.

Estate Duty.—No. 28 repeals Law No. 15 of 1899 and makes fresh provisions relating to the payment of duty upon estates of deceased persons. Estate duty shall be payable with regard to any person who dies on or after July 1, 1909, within or outside the Transvaal Colony, upon the net value of the deceased person's estate as far as it is situated in the Transvaal Colony, on condition that such property would, when that death occurred, pass to some other person.

Shares and debentures in a company registered in the Transvaal and carrying on business there shall for the purposes of this Act be deemed to be property in the Transvaal Colony, although the deceased holder of such shares or debentures was resident or domiciled outside the Colony at the date of his death. Every such company shall be liable to transmit notice to the Colonial Treasurer of such shares or debentures as soon as the death of the holder thereof shall come to the company's knowledge.

Companies whose registered office is outside the Transvaal Colony shall have to satisfy the Colonial Treasurer that the larger proportion of their business is transacted or carried on outside the Transvaal Colony if they want to escape the payment of estate duty on their shares.

Every such company has to transmit a return showing the names and addresses of persons who are, according to its registers, shareholders or debenture holders on July 31 of every year.

Companies.—No. 31 repeals a number of Laws and Volksraad resolutions and Ordinances, as set out in the first schedule, and consolidates and amends the law relating to the incorporation, registration, and winding up of companies and other associations. The provisions of this Act are virtually the same as those of the English Companies Consolidation Act, 1908.⁹

The differences mainly regard such parts as are otherwise regulated by

¹ Journal, N.S. vol. v. p. 383.

² Journal, N.S. vol. vi. p. 406.

³ Journal, N.S. vol. vii. p. 180.

⁴ Journal, N.S. vol. vii. p. 493.

⁵ Journal, N.S. vol. x. p. 378.

⁶ Journal, N.S. vol. x. p. 380.

⁷ Journal, N.S. vol. x. p. 375.

⁸ Journal, N.S. vol. vii. p. 179.

⁹ 8 Ed. VII. c. 69.

the Transvaal in special Acts. As mortgages according to Roman-Dutch law are created and registered in a manner foreign to English law, the main part of the Companies Consolidation Act, 1908, regarding mortgages and debentures has not been adopted. References to stamp duties in the English Act have not been embodied in the Transvaal Act, as these are separately regulated in the Acts providing for stamp duty and other revenues of the Colony.

The Transvaal Act does not provide any special limit as to the number of persons required for the formation of a company for banking purposes. It also does not recognise companies limited by guarantee.

The Transvaal Act prohibits companies from being registered under a name which may cause annoyance or offence to companies already on the register or with a name which includes the words "Imperial," "Royal," "Crown," "Government," etc., without having previously obtained the Governor's consent.

Another provision foreign to the English Act is the regulation of the manner in which notices of meetings to be held in the Transvaal have to be given to shareholders who are domiciled outside the Colony, either in or outside South Africa.

Mines.—No. 32 repeals the Mining Certificates Ordinance, No. 50 of 1903,¹ the Mines, Works, and Machinery Regulation Ordinance, No. 54 of 1903,¹ and its Amendment Ordinances, No. 31 of 1905² and No. 11 of 1906.³ The principal modification consists in consolidation and modification of the powers of the Governor to make regulations as to mines, works, and machinery.

Stock and Share Dealers or Brokers.—No. 34 provides for the registration of premises in which stocks and shares are dealt with and all persons who carry on the business of stock and share dealers or brokers. No person shall be allowed to own, occupy, or have the control of any premises in the Transvaal Colony which are used either by the public generally or by the members of any association for the purpose of dealing in stocks or shares unless such premises have been licensed for such purpose by the resident magistrate of the district in which they are situated.

No person or body of persons shall in the Transvaal Colony be entitled to carry on the business of a dealer or broker in stocks and shares outside licensed premises unless they are licensed themselves under the Act.

The names and addresses of the licensed premises and the licensed persons shall be published in the *Gazette* by the Colonial Treasurer.

Registration of Businesses.—No. 36 provides for the registration of businesses, other than registered companies and certain other associations, which are carried on in the Transvaal Colony by one or more persons (whether in partnership or not) if a licence is required therefor by the Revenue Licences Ordinance, No. 23 of 1905.⁴

¹ Journal, N.S. vol. vi. p. 413.

² Journal, N.S. vol. viii. p. 362.

² Journal, N.S. vol. vii. p. 496.

⁴ Journal, N.S. vol. vii. p. 95.

The particulars of the business and the persons carrying it on have to be supplied to the Licence Officer, who is appointed by the Colonial Treasurer. Notice has to be given of changes in title, constitution, or place where the business is carried on and of the transfer of the business. The Licence Officer shall keep registers in the prescribed form and supply sufficient information to the Registrar of Companies, who will keep the Central Register of businesses. These Registers as well as the Central Register shall be open for inspection on a written application, and copies may be obtained during the hours in which they are opened for inspection on payment of a fee of 1s. for every hundred words or less.

Special provisions are made as to the registration, dissolution, and insolvency of partnership. It is further provided that legal proceedings may be instituted by or against partnerships in the registered business style of the partnerships without setting forth the names of the individual partners.

Provision is also made to protect the name of a business by prohibiting the registration of a business by a name identical with a name of a business already registered or so nearly resembling that name as to be calculated to deceive. The same restrictions as in companies apply to the registration of businesses, viz. that a name calculated to cause annoyance or offence to any person, or suggestion of blasphemy or indecency, or including the words "Imperial," "Royal," "Crown," "Empire," or "Government," shall not be registered.

Special penalties are provided for default in complying with the provisions of the Act.

Racing.—No. 37 makes provisions for the regulation and control of horse, pony, and galloway racing, for the restriction of betting and wagering, and the prevention of the dissemination of information as to betting. Any person or association of persons who want to use ground for holding race meetings shall require a licence from the Attorney-General, to be renewable each year, and to be withdrawn at any time in case of non-compliance with these rules.

Betting is prohibited on certain days, and off the racecourse, as well as the publication of betting odds. Acts done in contravention hereof are punishable under the Act.

A further licence is required by a licensee for the holding of meetings to use a totalisator on a race day on a racecourse, and such totalisator requires the approval of the Commissioner of Police, while duty has to be paid to the Government on the gross takings, the net takings, and the unclaimed balances.

Authorisation may be obtained from the Attorney-General to keep open certain premises during two weeks after a race meeting for the settling of debts.

Finance.—*Erf Tax.*—No. 2 abolishes the payment of erf tax under Art. 5 of Law No. 4 of 1899 in certain municipalities and assesses the payment

thereof in certain other townships, while it provides that the land tax shall not be payable in respect of lots in townships.

Nos. 1, 9 and 16 are Supply Acts.

Revenue.—No. 15 amends Ordinance Nos. 16 and 23 of 1905¹ regarding trading licences, stamp duties and fees.

Architects.—The private Act No. 39 provides for the creation of the Association of Transvaal Architects, its Council to keep a register for the registration of all architects practising in the Transvaal (whether members of the Transvaal Institute of Architects or not); all assistant architects who had professional experience of at least seven years at the time of the coming into operation of the Act, and of those persons who were, at such time, possessed of qualifications and experience declared by proclamation issued by the Governor in Council, to be equal to the above-mentioned qualifications.

For the future only such persons shall be entitled to registration as have passed the examination or examinations to be instituted by the Council and prescribed by the by-laws of the Association or some other examinations which are by proclamation issued by the Governor in Council declared to be equivalent to these. On an equal footing with the Transvaal examinations shall be the examination for Associateship of the Royal Institute of British Architects or for membership of the Society of Architects of London.

Registration may also be granted in future to all persons who, at the time of the coming into operation of the Act, were registered as associates or fellows of the Royal Institute of British Architects, or members of the Society of Architects of London, or of the Transvaal Institute of Architects.

The Act further contains the rules for the payments of subscriptions, the holding of meetings, the election of the Council, the resignation of members, the making of by-laws, and further rules of the Association.

SUPPLEMENTARY LIST OF ORDINANCES.

- No. 3. Education Act (Further Amendment).
- No. 11. Game Preservation (Further Amendment).
- No. 14. Superior Courts Criminal Jurisdiction (Amendment).
- No. 17. Land and Agricultural Bank (Further Amendment).
- No. 19. Public Service and Pensions Act (Amendment).
- No. 27. Master and Servants Law (Amendment).
- No. 29. Shop Hours (Amendment).
- No. 30. Townships (Further Amendment).
- No. 33. Liquor Licensing Laws (Further Amendment).
- No. 35. Local Authorities Rating (Further Amendment).

¹ Journal, N.S. vol. vij. p. 495.

VI. WEST AFRICA.

[Contributed by ALBERT GRAY, ESQ., K.C.]

I. GAMBIA.

Ordinances passed—22.

Protectorate.—Grants of lands in the Protectorate have been made under the Public Lands Ordinance of 1902, and some doubts seem to have arisen whether those grants were effective for all purposes. It is now provided (No. 4) that the holders of those grants shall have the same rights of possession, etc., as if the lands had been in the Colony.

Sugar.—Ordinance No. 5 gives effect to the Sugar Convention of March 1902.

Diseases (Animals).—Extensive powers are taken by No. 6 for preventing the introduction of infectious and contagious diseases, the formation of quarantine and isolation stations, the registration and control of cow-keepers, etc.

Death Penalty.—Death sentences are not to be passed upon young persons under sixteen. They may be detained during His Majesty's pleasure in such manner as the Governor may direct (No. 11).

Intestates' Estates.—A law similar to that noticed in the laws of East Africa is provided for the administration of intestates' estates. Here, however, the administering officer is called the Curator (No. 19).

Departmental Offences.—A power to punish subordinate officers by fine is given by No. 20. The law applies only to officers, clerks, and labourers earning less than £100 per annum. The fine is not to exceed 20s. and may be imposed by the head of the department in respect of specified offences, among which are contravention of rules, disobedience to orders, damaging Government property, intoxication while on duty. The fine may be enforced by stoppage of pay. Heads of departments must report monthly to the Governor.

2. GOLD COAST.¹

(i) COLONY.

Ordinances passed—17.

Gold.—In order to prevent illicit dealings in gold, no person other than a concession holder may without special leave deal in any gold-mining product, which is defined as meaning any gold other than native gold or manufactured gold. Goldsmiths and hawkers must be licensed.

¹ This Colony has recently (September 1910) lost the services of its able and energetic Governor, Sir John P. Rodger, K.C.M.G., who has died on his return after five years' strenuous work in West Africa.

Marriage.—The existing Marriage Ordinance of 1884 is amended in a considerable number of small details (No. 2). The substantial amendments of law seem to affect natives only. Thus, in the case of natives dying intestate having been married according to law, two-thirds of the estate are to be distributed according to the English law, and one-third according to native law. Effect is given to African custom by the following provisions: Adultery does not include "intercourse of a man married by native customary law with an unmarried woman," and any child born before the inter-marriage of his parents under this Ordinance and not procreated in adultery is legitimised.

Mineral Oil.—A concession with respect to mineral oil is not to be granted except to a British subject or a firm, syndicate, or company, registered in Great Britain or a colony, whereof the directors must be British subjects.

Immigrant Paupers.—A law similar to that of Sierra Leone (*v.i.*) is passed for the Gold Coast (No. 10).

Death Penalty.—The same provision is made as in the Gambia prohibiting sentence of death on young persons under sixteen (No. 12).

(ii) NORTHERN TERRITORIES.

Ordinances passed—2.

Spirituous Liquors.—Stringent provisions are made by No. 2, so as to prevent the sale of liquor to natives. The importation of liquor is confined to non-natives and allowed by permit only.

(iii) ASHANTI.

Ordinances passed—3.

Cemeteries.—Every chief of a town or village is obliged on the demand of the Commissioner to provide a cemetery, and to keep it in repair. Where such provision is made, burial in yards and compounds is forbidden (No. 2).

3. SIERRA LEONE.

Ordinances passed—30.

Native Chiefs.—By Ordinance No. 3 for the Colony, and No. 6 for the Protectorate, the Governor may, with the approval of the Secretary of State, depose any chief who in his opinion is unfit for the position and appoint a person to be chief in his place. In particular cases he may fine a chief for misconduct in any sum not exceeding £10. Another law (No. 13) authorises

the Governor to disapprove the election of a headman, and to remove headmen for misconduct.

Tariff.—New tariff provisions, superseding the principal law of 1900 and seven amending laws, are made by No. 4. The ordinary duty is 10 per cent. *ad valorem*, with a fair schedule of exemptions, which might perhaps have been extended with advantage. Thus only books imported for the education department are exempt. While nearly all machinery and mechanical apparatus are free, it would seem that carriages and motor-cars are liable to duty. The progress of the Colony would probably be more rapidly advanced by the free introduction of books and of every means of conveyance.

Public Officers' Guarantee Fund.—The Governor may require any officer employed in revenue collection to give security for the faithful performance of his duties, not exceeding £500. He must also contribute to the Guarantee Fund annually 1 per cent. of his salary. The Fund is to be administered by Directors appointed by the Governor. After an officer has contributed to the Fund for five years he is not to be required to contribute more than one-tenth of 1 per cent. of his salary, unless the state of the Fund at any time otherwise requires. On the retirement or death of an officer he or his estate gets a refund of nine-tenths of his contribution (No. 10).

Medical Practitioners.—The Ordinance of 1908, which entitled persons holding certain diplomas to be registered as medical practitioners, is extended (No. 19). Now a degree at any medical school in Europe, the United States, or Japan, which is recognised in the United Kingdom, qualifies for registration.

Immigrant Paupers.—If any person arrives in the Colony under contract of service, and becomes destitute and chargeable to the Colony, his employers are responsible for all costs incurred by the Colony, including cost of removal from the Colony. If a seaman is left behind by a ship, the master is liable for such charges, which may be recovered also from the owner, agent, or consignee of the ship (No. 24).

Human Leopard and Alligator Societies.—The temporary law against these murder societies is again continued by No. 1. Further provisions are, however, made this year by No. 28, which renders a person liable to fourteen years' imprisonment for possessing without lawful excuse any of certain scheduled articles. These are leopard and alligator skins shaped for use so as to make a man resemble those animals, knives with two or more prongs commonly known as leopard or alligator knives, and the native medicine commonly known as "borfima." The law contains also provisions for search warrants, special punishment of chiefs found aiding and abetting these criminal clubs, etc.

Railways.—Provision is made by Ordinance 30 for railway extension by private enterprise. The law appears to follow the Gold Coast Ordinance of 1907, which was described in our Review of that year.¹

¹ Journal, N.S. vol. ix. p. 480.

4. NORTHERN NIGERIA.

Proclamations passed—21.

Railways.—Those who live laborious days in the study and working of our Railway and Lands Clauses Acts may be charmed with the simplicity of Nigerian methods. Many hundreds of miles of track will probably be laid under the powers of five short sections of Proclamation 3. The Governor may construct railways with all proper stations, etc. He may enter upon the lands required, paying compensation “for the actual damage, if any, occasioned in the course of such operations,” and any person refusing to give up possession of land may be ejected. Plans are to be prepared and exhibited for inspection at the Secretariat. The Director of Public Works or the General Manager may make regulations and by-laws.

Native Chiefs.—Certain emirs, a king, a “Lakpenni,” and a “Galadima” having been removed from their offices, have been settled at Lokoja and Ilorin. Proclamation No. 9 renders them liable to fine and imprisonment if they leave those places without leave of the Governor.

Judgments.—Where a decree or judgment has been obtained in a Provincial Court and it is desired to have it executed without the Protectorate, it may be transferred to the Supreme Court. It is then dealt with as a judgment of the Supreme Court.

The other laws make small corrections and amendments in previous legislation.

5. SOUTHERN NIGERIA.

Ordinances passed—23.

Intoxicating Liquor.—The distilling of spirits is forbidden except under a distiller's licence. It would seem that native distillation has hitherto been allowed (No. 2).

Desertion from Ships.—Penalties are imposed in the case of seamen deserting from or failing to join their ships. They may be arrested on shore by the master, mate, or consignee of the ship, without warrant, and forthwith taken before a Court (No. 16).

Municipal Board of Health.—The Board of Health for Lagos, already constituted under the Public Health Ordinance, 1908, is now incorporated and endowed with greater powers. It is made the authority for administering public laws as to auctions, spirits, dogs, markets, and public health generally, and it takes the fees payable under these enactments. A new source of revenue is assigned to it in the shape of a graduated wheel tax on all conveyances from hand-carts and bicycles to motor-cars (No. 18).

Protectorate.—The territory of Jebu Ode is within the geographical limits of the Protectorate, but has hitherto been governed by its native ruler. That ruler has now conceded his jurisdiction to the British Government. Technically, the provision is curious which vests that jurisdiction not in the Governor in Council or the Legislature of the Colony, but in the Supreme Court. The laws of the Colony generally are applied (No. 22).

Sedition.—Various seditious offences are made punishable under No. 23. They include exciting enmity against the King or the Government of Southern Nigeria, and promoting enmity between different classes of the population.

VII. EAST CENTRAL AFRICA.

[*Contributed by* ALBERT GRAY, ESQ., K.C.]

I. EAST AFRICA.

Ordinances passed—19.

Bills of Sale.—The intention of Ordinance 3 is to apply to the Protectorate the Bills of Sale Acts, 1878 and 1882, but it may be doubted whether that purpose is attained by the curious provision that this Ordinance “shall be read as one” with those Acts. The Ordinance does not otherwise apply the Acts, though it empowers the High Court to make rules for the proper application of the Acts within the Protectorate.

Collective Punishments.—Society has to be protected in African Protectorates by rough-and-ready laws, for which precedents may be found in the early history of England and the later history of Ireland. By Ordinance 4 the Governor may impose fines on villages, districts, or tribes, if after inquiry he is satisfied that any such community has harboured any criminal, suppressed evidence in a criminal case, failed to restore stolen property, or failed to use all reasonable means to bring the offender to justice where a man is found to be killed or seriously wounded within their borders.

Slavery.—Slavery was abolished by Ordinance in 1907, provision being made for compensation. It is now provided (No. 6) that claims for compensation will not be entertained unless made before January 1, 1912. The law of 1907 also provided that concubines (who were not to be deemed slaves) could apply to the Court for the dissolution of the bond of concubinage on the ground of cruelty. This provision is now repealed, with a proviso that all concubines lawfully held at the passing of this Ordinance, although free, shall with their children continue to enjoy all rights previously held under Mohammedan law, except that any concubine leaving her master without his consent shall sacrifice those rights, including the right to the custody of her children.

Witchcraft.—Efforts continue to be made to stamp out witchcraft.

Ordinance 9 provides that any person who for the purposes of gain holds himself out as a witch doctor or pretends to exercise or use any kind of supernatural power, witchcraft, sorcery, or enchantment, shall be liable to imprisonment for one year. Any person professing a knowledge of so-called witchcraft or the use of charms who shall advise any person applying to him how to bewitch or injure persons, animals, or other property, or who shall supply any person with the pretended means of witchcraft, is liable to imprisonment for ten years; and the person who puts the advice into practice is to be similarly punished. Chiefs and headmen cannot be prosecuted under this law without the sanction of the Governor.

Death Penalty.—Sentences of death are not to be passed on young persons, *i.e.* under the age of sixteen years. They are to be detained during His Majesty's pleasure in such place and in such manner as the Governor may direct (No. 10).

Municipalities.—While the laws above described exhibit one aspect of East African administration, the establishment of Municipal Councils by Ordinance 11 indicates the advances of civilisation. The Governor may by Proclamation transform a township into a municipality with powers and privileges, rights and responsibilities, such as we are accustomed to. Very extensive powers of subordinate legislation by by-law are conferred; but in some questions relating to public health the by-laws may be superseded or supplemented by regulations made by the Governor. The councils are authorised to borrow money for their general purposes with the sanction of the Governor. Though election of councillors is contemplated, the members are for the present to be nominated.

Intoxicating Liquor.—A very elaborate Law (No. 12) supersedes the existing laws of 1902 and 1903 as to the sale of liquor. No less than thirteen different licences are provided for, under the following heads: Wholesale, hotel, restaurant, malt, wine-merchants and grocers, general retail, club, railway station, theatre, temporary, brewers, steamship, and canteen. The control of licences is in the hands of licensing Courts for the several provinces, consisting of named officials and such non-officials as the Governor may appoint. Strict provisions are made against the sale of liquor to natives, except for medicinal purposes, and then the onus of proof of the necessity is thrown upon the seller. The licence duties range from Rs. 15 a day, for a temporary licence, to Rs. 500 for an annual general retail licence.

Equitable Mortgages.—In amendment of s. 59 of the Indian Transfer of Property Act, 1882, validity is given (Ordinance 14) to mortgages made by delivery to a creditor or his agent of a document of title to immovable property, with intent to create a security thereon. The intention is to assimilate the law in Africa to that in England as to deposit of title-deeds. A saving is added in favour of documents registered before the date of the Ordinance.

Sleeping Sickness.—The Governor may declare any district or place to be an infected place, and may thereupon make rules for the regulation of intercourse between that place and other places (Ordinance 15).

Fires.—Penalties are provided in the case of persons raising fire negligently on the property of others, leaving fire in open spaces without seeing that it is thoroughly extinguished, etc. Owners burning stubble, grass, etc., must see that the fire does not extend beyond their own property (Ordinance 16).

Intestate Estates.—An Administrator-General's Department is constituted by Ordinance 17. All intestate estates are placed in the hands of the Administrator-General, except those of Europeans leaving a widow or next-of-kin within the Protectorate.

Deportation.—The Governor may on sworn evidence deport any native who is conducting himself so as to be dangerous to peace or good order from one part of the Protectorate to another. Every order is to be reported to the Secretary of State (Ordinance 18).

Protection of Game.—The Game Laws, which were last revised in 1906, are again amended. The procedure by new Ordinance (No. 19) is to be highly commended, although it renders it difficult to trace all the changes. It is satisfactory, however, that each new law aims at greater restrictions upon the slaughter of wild animals. Four ordinary licences are provided for: sportsmen's, residents', travellers', and landholders'. The landholders' licence is confined to private lands. In the case of the other three respectively, the number of animals authorised to be killed is set forth in schedules. A sportsman's licence costs Rs. 750, a resident's Rs. 150, a traveller's Rs. 15, and a landholder's Rs. 45. None of these licences authorises the killing of animals named in the first schedule, among others elephant, giraffe, greater kudu and buffalo (cows), hippopotamus, and eland (in certain districts). A special licence to kill one elephant costs Rs. 150 in addition to the sportsman's or resident's licence; to kill two elephants, Rs. 450. A special licence to kill one bull giraffe costs Rs. 150 in addition. The regulations show a step in advance, but greater protection for the rarer animals is inevitable in the future. The Ordinance also makes strong provision for preventing the sale and export of horns, skins, etc., other than those obtained under the licences.

2. UGANDA.

Ordinances passed—20.

Collective Punishment.—An Ordinance similar to that of East Africa (*v.s.*) is passed for Uganda (No. 1).

Vagrancy.—Vagrants may be arrested by police officers without warrant, and if found by a magistrate to be so, may be committed to gaol for three

months. When in gaol they are credited with an allowance of 8 annas a day as wages, and when that fund amounts to the sum necessary for their passage home, they may be sent thither either by land or water (No. 4).

Applied Indian Acts.—Indian Acts amending or substituted for Acts in force in the Protectorate are not to apply unless expressly applied by Ordinance (No. 3).

Poll Tax.—Every adult male (*i.e.* above eighteen years) has to pay a poll tax of Rs. 5 per annum, unless he is exempted by the District Commissioner on account of age, infirmity, or disease (No. 5 and 17). Another Ordinance (No. 6) enables the Governor to reduce the tax to any sum not less than Rs. 2 in respect of any district.

Prisons.—A new Prison Ordinance (No. 9) is substituted for the law of 1903. It comprises all usual provisions as to prison staff, visiting justices, discipline and diet of prisoners, tickets of leave, etc.

Evidence.—The Indian Evidence Law, as adapted for Uganda use, is issued as Ordinance No. 11.

Death Penalty.—As in East Africa, death sentences on young persons under sixteen are prohibited (No. 12).

Mortmain.—Trustees appointed by any association of persons established for any religious, educational, literary, scientific, social or charitable purpose may apply to the Governor for a certificate of registration for themselves or the association as a corporate body. The Governor will insert in the certificate the particulars of the qualifications and number of the trustees, the amount of land to be held by them, and the purposes for which the land is to be applied (No. 16).

Cruelty to Animals.—Ordinance No. 18 is a law of normal type on this subject. It applies only to domestic animals and others kept in confinement.

Ostriches.—Ostriches are now dealt with outside the Game Laws by Ordinance No. 19. This seems proper, as the subject now includes provisions for the regulation of ostrich-farmers. Every farmer, who must be of European birth or descent, must be registered (fee Rs. 5). An ostrich-hunter pays Rs. 45 for a licence, while a feather merchant pays Rs. 15. Hunting ostriches and taking their eggs is allowed only for the purposes of ostrich-farming; thus a hunting licence is granted only to a farmer or his assistants. Returns must be made of the young ostriches captured. Feather merchants must deal only with ostrich-farmers, and they must keep careful registers of their transactions. A live ostrich cannot be exported without licence, for which the fee is Rs. 1,500. To export an unblown egg will cost a man Rs 75.

3. SOMALILAND.

Ordinances passed—2.

King's African Rifles.—The native force of this Protectorate is constituted as the 6th Battalion of the King's African Rifles. It is recruited for service in, or rather "is charged with the defence of the East Africa, Uganda, Nyasaland, and Somaliland Protectorates." The provisions as to enlistment, discipline, etc., follow the precedents of other African Protectorates (No. 1).

Poisons.—The Commissioner may by special permit authorise a person who does not hold a licence under the Poisons Ordinance of 1906 to import poisons in limited quantities for scientific purposes (No. 2).

Game.—By Administrative Orders the number of specified animals which may be killed under licence is altered.

Pearls.—An export duty of 1 per cent. *ad valorem* is imposed on pearls.

4. NYASALAND.

Ordinances passed—11.

Seditious Offences.—The exigencies of Protectorate Government require that unruly natives shall be removed from the district in which they are found to be dangerous to order. It is well that they should be detained at places within the Protectorate, where their surroundings may be similar to those in which they were bred. In Nyasaland, the Resident may detain any such person, reporting the matter at once to the Governor, who gives order as to place and manner and time of detention (No. 1).

Collective Punishment.—Ordinance No. 6 on this subject is similar to that of East Africa described above.

Native Labour.—Three existing laws are repealed, and the enactments relating to native labour are amended and consolidated in Ordinance No. 6. The subject is dealt with under three heads: service within the Protectorate, passes for natives leaving the Protectorate, and recruitment of natives. Contracts for service of more than one month must be in writing and executed before a magistrate. Wages must be made in cash with no deductions, excepted for deferred pay. All proper obligations as to housing, feeding, and medical attendance are imposed on the employer, while the employee is liable to summary penalties (enforced by a Court only) in case of disobedience, intoxication, desertion, etc. Passes are given by a magistrate, who must be satisfied that the native has made proper provision for his wife or wives and family, and that he is not evading his taxes or debts. Natives cannot be recruited for service outside the Protectorate except by licence and in districts in which such recruiting is allowed. The agreements must be made or terms arranged before a magistrate.

VIII. SOUTH ATLANTIC.

[Contributed by EDWARD MANSON, ESQ.]

1. ST. HELENA.

Ordinances passed—2.

Both Ordinances relate to supply.

2. FALKLAND ISLANDS.

Ordinances passed—9.

Marriage (No. 3).—This Ordinance extends the provisions of the Deceased Wife's Sister Marriage Act, 1907, of the Imperial Parliament, *mutatis mutandis*, to the Colony and its Dependencies.

Criminal Law (No. 4).—Sentence of death is not to be pronounced on a "child" or "young person." In lieu thereof they may be detained during His Majesty's pleasure under such conditions as the Governor may direct.

"Child" means a person under fourteen. "Young person" means a person between fourteen and sixteen.

Appeals to Privy Council (No. 5).—This Ordinance regulates the practice and procedure in the Colony on appeals to His Majesty in Council.

An appeal is to lie—

- (1) As of right from any final judgment of the Court where the matter in dispute amounts to or is of the value of £500 or upwards or where the appeal involves some claim respecting property or some civil right amounting to £500 or upwards ;
- (2) At the discretion of the Court from any judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

The remainder of the Ordinance deals with the form of application for leave to appeal, the conditions, the preparation of the record, and other matters of procedure.

Penguins (No. 7).—This Ordinance makes it unlawful for any person to kill or take penguins in the Dependencies, on pain of a penalty of £30. Masters of vessels allowing the vessel or any boat to be used for killing or taking penguins is liable to a penalty of £100.

Education (No. 8).—A system of compulsory education on the lines of the Imperial Act, 1872, is established for Stanley. All children between five and fourteen residing there must attend school unless receiving efficient instruction in some other manner, or prevented by illness or other unavoid-

able cause. Parents residing outside Stanley may have their children educated by Government itinerant or resident schoolmasters. There are provisions for the appointment of pupil-teachers. Regulations for Government schools are scheduled to the Ordinance.

Merchant Shipping (No. 9).—Portions of the Imperial Merchant Shipping Acts, 1894 and 1896, are made applicable to the Colony.

IX. NORTH AMERICAN COLONIES.

1. DOMINION OF CANADA.

Public General Acts—62 ; Local and Private—115.

News by Telegraph (No. 7).—The Governor in Council is authorised to pay out of the Consolidated Revenue Fund during the coming six years sums for the purpose of maintaining an independent and efficient service of telegraphic news from Great Britain for publication in the Canadian press. Before paying the amounts the Minister of Finance is, however, to satisfy himself that the benefits of the service are open on fair and reasonable terms to all newspapers published in Canada, and that not less than one-half of the cost of maintaining the service is paid by the proprietors of the newspapers participating in the benefits of it.

Combines Investigation (No. 9).—"Combine" is here defined as meaning "any contract, agreement, arrangement, or combination which has or is designed to have the effect of increasing or fixing the price or rental of any article of trade or commerce, or the cost of the storage or transportation thereof, or of the restricting competition in or of controlling the production, manufacture, transportation, storage, sale, or supply thereof to the detriment of consumers or producers of such article of trade or commerce, and includes the acquisition, leasing, or otherwise taking over or obtaining by any person to the end aforesaid of any control over or interest in the business or any portion of the business of any other person, and also includes what is known as a trust, monopoly, or merger."

When six or more persons, British subjects resident in Canada and of full age, are of opinion that a "combine" exists, and that prices have been enhanced or competition restricted by reason of such combine to the detriment of consumers or producers, such persons may make an application to a judge for an order directing an investigation into such alleged combine, and the judge, if satisfied that such a combine exists, is to refer the matter to a "Board" constituted under the Act and consisting of three members appointed by the Minister of Labour who are, after taking an oath of impartiality, to investigate and report in writing.

A person reported as guilty of any of the mischiefs involved in a combine

is to be guilty of an indictable offence and liable to a penalty of \$1,000 and costs.

The Act is not to affect in any way the Trade Unions Act, 1906, No. 125.

Criminal Law.—No. 10 amends s. 22 of the Criminal Code by a new definition of "common betting place" and also s. 235 dealing with the offences of betting, pool selling, and bookmaking.

No. 11 adds to the Code a provision against theft of motor-cars.

No. 12 amends s. 424 of the Code in respect of the unlawful possession of rock ore or quartz containing gold or silver.

No. 13 imposes a penalty on motor-car drivers, driving on after an accident without rendering assistance and giving his name and address.

Government Annuities (No. 4).—Amends the Act of 1908 by authorising the sale of annuities by the Government by limiting the grant to the life of the actual annuitant and by providing for the conversion of annuities by married persons.

Currency (No. 14).—This Act fixes the denominations of money—dollars, cents, and mills—in the currency of Canada and the standard for gold and silver. It provides for the making of coins and defines what constitutes a legal tender, which includes a British sovereign. The Governor in Council may fix the rates at which any foreign gold coins are to be a legal tender.

Dominion and bank notes are to be issued in currency only. Assay commissioners are to be appointed to examine and test the fineness and weight of coins reserved for this purpose. Counterfeit coins are to be broken or defaced by officers employed in the collection of the revenue.

Dry Docks (No. 17).—With a view to encourage the construction of these the Governor in Council may authorise payment of a subsidy therefor.

Escheat (No. 18).—This Act confers a useful power. The Governor in Council is empowered—

- (a) to make a grant of escheated property to any person who in the opinion of the Governor in Council had a legal or moral claim upon the previous owner or a just or natural right or claim to succeed to his property or to any part thereof;
- (b) to carry into effect any disposition of such property which the Governor in Council believes the previous owner may have intended;
- (c) to reward any person making discovery of such property to his Majesty.

Convention with France (No. 21).—The Supplementary Convention respecting the commercial relations between Canada and France is hereby approved.

Immigration (No. 27).—This is an Act of eighty-two sections with scheduled forms regulating immigration. "Immigrant," what it covers and what it does not cover, is very fully defined: (a) Idiots, imbeciles, feeble-minded persons, epileptics, and insane persons; (b) persons afflicted with any

loathsome disease or any disease which is contagious or infectious ; (*c*) persons who are dumb, blind, or otherwise physically defective ; (*d*) persons who have been convicted of any crime involving moral turpitude ; (*e*) prostitutes and pimps ; (*f*) procurers ; (*g*) professional beggars or vagrants ; (*h*) charity emigrants, unless on authority in writing shown from the Superintendent of Immigration ; (*i*) persons not complying with the regulations—all these are prohibited immigrants.

Boards of Inquiry of three or more officers, including the "immigration officer," are to be appointed for every port of entry, with authority to determine summarily on the cases of immigrants. An appeal may be taken to the Minister.

Separate special regulations are made for passengers by sea and passengers by land.

Immigrants may be required to possess a prescribed amount of money. Rejected immigrants must be re-conveyed to country of birth or citizenship. Immigrants who have within three years of landing become undesirables may be deported.

Persons trying by false statements to deter immigrants may be prosecuted. Licences may be granted to "immigrant runners."

Plant Pests (No. 31).—This subject—the microbe world in agriculture—is one which is receiving more and more attention. The present Act authorises the Governor in Council to make regulations to prohibit the admission into the Dominion of vegetable "undesirables," to prevent their spread within the Dominion, the sale of infected plants, and to secure the notification of plant disease. Infected areas may be defined, and removal of vegetation from them prohibited.

Insurance (No. 32).—Insurance—owing to its rapid growth in every form in recent years—has assumed a position of first-rate importance as a factor in commercial organisation. We see it reflected in the present Act of 188 sections supplemented by forms and tables.

Under Part I. insurance business is not to be carried on without an annual licence. Every company carrying on life or fire business is to deposit with the Minister of Finance \$50,000 ; to file certain documents—a copy of its charter, a power of attorney to its agent in Canada, and a statement of the affairs of the company. Annual returns must be made and a half-yearly statement of securities. A Superintendent of Insurance is to be appointed, who is to visit the head offices of insurance companies and report to the Minister of Finance on the administration of the Act. There are special regulations as to investments. Part II. deals specially with Life Insurance, and Part III. with Fire Insurance ; Part IV. with Insurance other than Life or Fire. Part V. contains provisions applicable to companies hereafter incorporated by Parliament.

Naval Service (No. 43).—This Act constitutes, as a department of the Government of Canada, a Department of Naval Service presided over by

the Minister of Marine and Fisheries, who is invested with the control of all naval affairs. The Governor in Council is empowered to organise and maintain a permanent naval force, which may be put on active service at any time. He may also organise a naval volunteer force. A Naval College is to be established, and arrangements made for target practice by vessels. The Naval Discipline Act of 1866 (U.K.) and the King's Regulations and Admiralty Instructions are adopted.

Milk.—No. 59 is a short Act to provide for the testing, as to measurement and accuracy, of glassware used in connection with milk tests.

Carriage of Goods by Water (No. 61).—Certain clauses in bills of lading and similar instruments exempting shipowners or charterers from liability for loss or damage to goods arising from negligence in the proper lading or care of the goods are prohibited; so are clauses derogating from the obligation to make and keep the vessel seaworthy.

MISCELLANEOUS MINOR ACTS.

Bounties on Crude Petroleum (No. 46).

Bounties on Iron and Steel made in Canada (No. 33).

Bounties on Lead in Leadbearing Ores mined in Canada (No. 37).

Civil Service.—No. 9 amends the Civil Service Act in a number of details.

Customs Tariff.—No. 46 amends the C.T. of 1907 in various items.

Fisheries.—No. 20 amends the Fisheries Act, 1906, in a number of particulars.

Gas Inspection.—No. 23 amends the Gas Inspection Act, R.S. 1906, No. 87.

Government Railways.—No. 24 amends the Government Railways Act, 1908, No. 31.

Irrigation.—No. 34 amends s. 13(2) of No. 38 of the Act of 1908.

Indians.—No. 28 amends the Indians Act, No. 81, as to recovery of possession of reserves.

Industrial Disputes.—No. 29 amends the Act of 1907 relating to these.

Judges' Salaries.—No. 35 amends No. 138 of the R.S. 1906.

Land Titles.—No. 36 amends R.S. 1906, No. 110, s. 26.

Meat and Canned Foods.—No. 38 amends the Act of 1907, No. 27.

Militia Pensions.—No. 39 amends the Act of 1906, No. 42.

National Battlefields at Quebec.—No. 41 amends the Act of 1907, No. 57.

National Resources Conservation.—No. 42 amends the Act of 1909, No. 27.

Navigable Waters Protection.—No. 44 amends the N.W.P. Act of 1906, No. 115.

Post Office.—No. 47 amends the Act of 1906, No. 66.

Prisons and Reformatories.—No. 48 amends the Act of 1906, No. 148.

Railways.—No. 25 authorises Government to acquire by lease certain

railways. No. 50 amends the Railway Act, 1906, No. 37. No. 51 relates to grant of subsidies.

Supply.—Nos. 1, 2, 3.

Seed Control.—No. 54 amends the Act of 1906, No. 128.

Telegraphs.—No. 55 amends the Act of 1906, No. 126.

Temperance.—No. 58 amends the Act of 1906, No. 152.

Volunteers' Bounty.—No. 60 amends the Act of 1908.

Winding-up.—No. 62 amends the Winding-up Act.

2. BRITISH COLUMBIA.

Medicine (No. 6).—"The College of Physicians and Surgeons of British Columbia" incorporated under the Medical Act, 1898, is to be deemed a body corporate from its first establishment, and every person hereafter registered under the Act is to be a member of the College.

A Council is established to be elected from five medical electoral districts of the Province, with officers and an executive committee.

S. 28 defines the qualifications requisite for a member of the College and s. 29 provides for the keeping of a register. Inquiries may be directed by the Council as to alleged unprofessional conduct by members. It is "unprofessional conduct" for any medical practitioner to place the name of any druggist on a prescription.

No action is to be brought against the Council or Executive Committee for anything done *bona fide* under the Act.

"Practice medicine" includes advertising willingness to diagnose or prescribe. Practitioners are not to use any trade or corporate name for the premises where they practise.

No medical certificate is to be valid unless signed by a person registered under the Act. Actions for negligence or malpractice must be brought within a year.

Bodies of persons found dead or publicly exposed, unless claimed by friends or relations, may be delivered for dissection, also the bodies of persons dying in public State-aided hospitals, unless such persons otherwise direct.

Liquor in Clubs (No. 7).—"Liquor" here includes "all spirituous and malt liquors and all combinations of liquors and drinks and drinkable liquids which are intoxicating."

No such "liquor" is to be sold by any club to a member unless such club is licensed. The licence is to be issued by the Superintendent of Provincial Police with the consent in writing of the Attorney-General and to remain in force till the end of the year; the fee to be \$100. The licence does not authorise the sale of "liquor" to minors.

The Superintendent of Provincial Police may at any time on the direction of the Attorney-General enter and inspect the premises.

A licence may be cancelled by the Lieutenant-Governor in Council if the conditions are violated.

Fruit Dépôts (No. 19).—The Provincial Board of Horticulture may by this Act grant licences for the establishment of fruit dépôts for the preparation for market and shipment of Provincial grown fruit: and loans for the establishment of such dépôts may be made by the Lieutenant-Governor in Council.

Game Protection (No. 20).—Increased stringency marks the legislation in this matter. Exportation of certain animals is prohibited, and the hunting or shooting of animals imported for acclimatisation is prohibited. The Act does not apply to Indians and resident farmers in unorganised districts killing deer for their own or their families' use for food only.

Inspection of Hospitals (No. 25).—The Lieutenant-Governor in Council may designate what institutions—hospitals, orphanages, sanatoriums, maternity homes—are to be inspected and appoint inspectors for the purpose.

Statute Law Revision (No. 41).—The Lieutenant-Governor in Council is empowered under this Act to appoint Commissioners for revising, classifying, and consolidating the Revised Statutes of British Columbia, 1897, the Public General Statutes of British Columbia passed since the date of the Revised Statutes, and the Public Statute Law of England in force in and applicable to the Province. In doing the work alterations may be made in the language where requisite to preserve a uniform mode of expression.

This is a good work, and the time has come when it was much needed.

Water and Water Power (No. 48).—This is an important Act in seventeen parts. It confirms to the Crown the ownership of all water, fixes the work of measurement, creates a tribunal for determining claims, lays down the procedure for the grant of water licences, invests municipalities with special powers, regulates the storage of water, provides for clearing streams for driving logs, for the taking and using of land, etc.

MISCELLANEOUS MINOR ACTS.

Agriculture.—No. 38 makes exceptions in favour of agriculture of the sale of poisonous substances.

Appeals.—No. 9 amends the Court of Appeal Act, 1907.

Arbitration.—No. 2 amends R.S. 1897, No. 9, s. 7, by giving power to supply vacancies.

Bush Fires.—No. 18 amends the Bush Fires Act, R.S. No. 84, s. 5, by allowing fires for clearing land on permit.

Coal Mines.—Nos. 33 and 34 amend No. 138 of the R.S.

Companies.—No. 8 repeals R.S. No. 44, s. 161, as to a free miner's licence to companies.

Dairy and Live Stock Associations.—No. 4 amends R.S. 1897, No. 18, s. 29, as to the incorporation of these associations.

Ditches and Watercourses.—No. 11 amends No. 14, s. 5, of the Act relating to.

Explosives, Storage of.—No. 14 amends R.S. 1897, No. 74, s. 2.

Farmers' Institutes.—No. 5 amends R.S. 1897, No. 20, s. 15, as to the incorporation and memorandum of association of these institutes.

Fire Insurance.—No. 17 amends the Fire Insurance Policy Act, R.S. No. 82, s. 5.

Horticultural Board.—No. 24 amends the H.B. Act, R.S. No. 94, s. 2.

Jurors.—No. 27 amends Acts relating to.

Land.—No. 28 amends the Land Act, 1908, in several matters of detail.

Land Registry.—Nos. 29 and 30 amend the L.R. Act, 1906.

Municipal Elections.—No. 12 amends ss. 14, 27, and 37 of the Act (1908) relating to.

Municipal Clauses Act amended (No. 37).

Magistrates.—No. 21 amends the Magistrates Act, R.S. No. 127, s. 8.

Police.—No. 21 amends the Police and Prisons Regulation Act, 1903-4.

Minerals.—No. 32 amends the Mineral Act, 1909.

Mines, Inspection of.—No. 35 amends R.S. No. 134.

Provincial Elections.—No. 13 amends s. 10 of the Act (1903-4) relating to.

Reformatories.—No. 40 substitutes the name of Industrial School for Reformatory.

Succession Duty.—No. 42 amends the S.D. Act, 1907.

Supply.—Nos. 39, 43.

Supreme Court.—No. 10 amends No. 15, s. 69, of the Act relating to this.

Timber.—No. 44 amends the Timber Manufacture Act, 1906.

Vendor and Purchaser.—No. 45 amends the law by, *inter alia*, making recitals in deeds twenty years old *prima facie* evidence.

3. PROVINCE OF MANITOBA.

[Contributed by H. STUART MOORE, ESQ.]

Acts passed—Public, 79; Private, 30.

Workmen's Wages (No. 2).—This requires that an assignment of wages or salary to be earned, given for a loan of less than \$200, to be valid against an employer must be accepted by him and registered with the clerk to the County Council. This does not apply to assignments to secure indebtedness for necessities. If the assignment is made by a married man living with his wife, her consent must be obtained. No assignment is valid unless the loan exceeds 95 per cent. of the amount of wages assigned.

Hospitals (No. 7).—This Act amends the Charity Aid Acts and provides that in the case of a patient admitted to a public ward the municipality of which he was a resident must contribute to his support. In the event of the death of the patient the municipality is liable to contribute a sum not exceeding \$15 towards the cost of his burial. In the case of incurables the municipality must either remove him or pay \$1.50 a day. The municipality has a remedy against the estate of the patient for its payments and may agree with hospitals to commute their liability for a fixed annual payment.

Foreign Companies (No. 10).—This Act provides that certain corporations created otherwise than by or under the authority of an Act of the legislature of the Province shall not carry on business in the Province unless licensed under this Act so to do. The Act prescribes the method by which a licence can be obtained.

Fires.—No. 19 amends the Manitoba Evidence Act by providing that in actions for damages resulting from fire, proven to have been started by sparks from a railway locomotive, it shall be conclusively and indisputably presumed that such fire was occasioned either by negligent management on the part of the employees in charge of the locomotive or by imperfect construction thereof.

Game Preservation (No. 22).—The Game Protection Act, 1909, provides that Sunday be a close season for all birds and animals mentioned in the Act. Male deer, cabri or antelope, elk or wapiti, moose, reindeer, or cariboo may not be taken between December 15 and December 1 of the following year, and during the remainder of the year no one may take more than one of such animals. Every hunter must be licensed, and at the end of the season must return his licence with a sworn statement as to the number of animals taken by him. Every person who lawfully kills any of the above animals must produce its head or account for the same on demand of any person. No one may trap, take, or destroy any female deer, cabri or antelope elk or wapiti, moose, reindeer, or cariboo or the fawns of any such animal, or any bison or buffalo, or otter or beaver, at any time, or any mink, fisher or pekan, or sable or marten, between April 1 and November 1. Musk-rat are protected between May 1 and November 1, but municipalities may make special by-laws as to these animals. There are various provisions as to the capture of grouse, prairie-chicken, partridge, pheasants, plover, quail, snipe, and duck. And the number of such birds that each sportsman may take in any year is defined. Certain methods of capture are prohibited.

The nests and eggs of birds mentioned above are protected. The heads and skins of animals may not be exported out of the Province unless a special permit is obtained, but a non-resident is entitled to export a hundred geese or swans and fifty ducks. Guardians are appointed to carry out the Act.

King's Counsel (No. 28).—This Act provides that not more than four King's Counsel shall, except in certain cases, be made in any one year. King's Counsel must be of ten years' standing either of the Bar of Great

Britain or of a province of Canada or of the North-West Territories. The precedence of members of the Bar for the Province is (1) the Attorney-General of the Province; (2) members of the Provincial Bar who have been Attorney-General of the Dominion of Canada or of the Province according to seniority of appointment; (3) members of the Provincial Bar who have been Solicitor-General for Canada; (4) King's Counsel according to precedence assigned to them by the Lieutenant-Governor in Council, or according to seniority; (5) members of the Bar in the order of their call to the Bar of the Province.

Liquor Traffic (No. 31).—This Act amends the Liquor Licence Act, and provides *inter alia* for the voting for a local option by-law and the licensing of certain incorporated clubs to keep liquor for the use of its members. In this session the following clubs were incorporated by private Acts: the Adanac Club, the Commercial Club of Winnipeg, the Lake of the Woods Yacht Club, the Moose Club, and Winnipeg Beach Club.

Oculists (No. 47).—The Optometry Act regulates the practice of optometry or the employment of any means other than drugs, medicine, or surgery for the measurement of the powers of vision and the adaptation of lenses for the aid thereof. Boards of examiners in optometry are created to examine and license persons to practise optometry and to keep a register of its certificated licensees.

No one practising optometry may use the prefix "doctor" unless a licensed graduate of a recognised school of medicine. This Act does not apply to physicians or surgeons, nor to the vendor of glasses made in prescription of an oculist or registered optometrist or of ready-to-wear glasses as merchandise.

Criminal Law (No. 50).—The Probation of Offenders Act enables Courts of summary jurisdiction to release an offender on probation, and probation officers are appointed to see that such person fulfils his undertakings for good behaviour, and if necessary they endeavour to find him suitable employment.

Education (No. 56).—This Act makes numerous small amendments to the Public School Act.

Sale of Goods (No. 60).—The Bulk Sales Act, 1909, enacts that every person who buys goods in bulk for cash or on credit, before he completes his purchase, shall demand and receive of the vendor a written statement verified by the statutory declaration of the vendor or his agent containing the names and addresses of all the creditors of the vendor for amounts exceeding \$50 together with the amount of the indebtedness or liability due. If this statutory declaration is not demanded and furnished the sale is deemed fraudulent and void as against the creditors of the vendor. On obtaining such declaration the purchaser, if he does not obtain the written waiver from the creditor, must deliver the purchase money to a trust company or official assignee for distribution under the Assignments Act. A sale in bulk means a sale or transfer of a stock of goods, ware, or merchandise, or part thereof, out

of the usual course of business or trade of the vendor, or whenever substantially his entire stock-in-trade or an interest in his business or trade is sold or conveyed.

Appropriation (Nos. 70 and 71).—These Acts provide \$2,718,128 for the government of the Province for the year ending December 31, 1909.

4. SASKATCHEWAN.

The Legislation of Saskatchewan will appear next year.

5. PROVINCE OF ONTARIO.

[*Contributed by* JAMES S. HENDERSON, ESQ.]

Acts passed—165, of which 69 were Local or Private.

Elections.—No. 3, the Punishment for Personation Act, provides for summary proceedings before a police magistrate or two justices of the peace for the punishment of the offence of personation.

Public Officers.—No. 5, the Public Officers Act, enacts that no person shall be employed in any public office in Ontario who is not a British subject by birth or naturalisation, except where the employment is for temporary purposes. Commissions are continued on the demise of the Crown. The Act also provides the forms of oaths of allegiance and office, and for security being given by officers who are concerned in the collection, receipt, disbursement, or expenditure of public money.

Sheriffs.—No. 6 is the Sheriffs Act. It is for the most part a purely consolidating Act, dealing with the appointment and duties of sheriffs.

Public Revenue.—No. 9 is the Public Revenue Act, consolidating the law as to the collection and management of the revenue.

Audit.—No. 10 amends the Audit Act. It provides, *inter alia*, for a reference to the Treasury Board where the auditor has for any reason refused to certify that a cheque may issue. No. 11 also amends the Audit Act by providing that the fiscal year shall, for the purpose of the public accounts, include the period from November 1 in one year to October 31 in the next year.

Succession Duty.—No. 12 amends and consolidates the law on this subject. Estates the aggregate value of which do not exceed \$10,000 are exempt from duty, as are also bequests to charity; property passing to certain relations of the deceased where the value of the property of the deceased does not exceed \$50,000; and where the whole value of any property passing to any one person does not exceed \$300. The Act also prescribes the rate of duty.

Law Stamps.—No. 13 is the Law Stamps Act. Court fees are to be paid in stamps, and there is an express prohibition against money being received by any Court or officer of Court for any fee.

Mining Regulations.—No. 17 amends the Mining Act. It enables the inspector and any person authorised by him to be present at, and take part in, the proceedings at any inquest held concerning a death caused by an accident at a mine. It further provides additional punishment where an offence calculated to endanger the safety of those employed at a mine has been committed wilfully by the personal act, default, or negligence of the accused.

Drainage.—Nos. 21 and 22 deal with aids being granted for drainage purposes.

Statute Law Amendment.—No. 26 amends the law in various particulars.

Fire Escapes in Hotels.—S. 29 amends the Act for Prevention of Accidents by Fire by requiring all hotels, instead of, as formerly, those more than two stories in height, to keep in each sleeping apartment above the ground floor a fire escape for the use of guests.

Libraries.—S. 21 enables the Library Board in certain cities to lease unoccupied portion of premises for the purposes of an art museum. (See also No. 80, *infra*.)

Shows.—S. 36 provides for detectives or constables having free access to all kinds of shows and exhibitions.

Insurance Companies.—S. 43 amends the Ontario Insurance Acts by providing that no transfer of shares of an insurance company, the whole amount whereof has not been fully paid up, shall be made without the consent of the directors; and whenever any such transfer is made, with their consent, to a person not apparently of sufficient means to fully pay up such shares, the directors are made jointly and severally liable to the company's creditors in the same manner and to the same extent as the transferring shareholder would have been. Non-assenting directors may protest and give public notification thereof, and in this way may exonerate themselves from liability.

Shorthand-Writers for Local Courts.—S. 45 enables the Lieutenant-Governor to appoint a shorthand-writer for the local courts of each county and provisional judicial district.

Judicature.—No. 27 enables a judge of the High Court to give judgment in any action, notwithstanding that pending the delivery of judgment he has resigned or been promoted, provided that such judgment be delivered within eight weeks of his resignation or promotion. Where a judge dies or resigns before the delivery of judgment in any cause or matter which has been fully heard by him or where any action, etc., has been tried by a judge, and judgment is not delivered by him within six months of the hearing, or in case of his resignation within eight weeks thereafter, then any party to the action, cause, or matter may, after serving one month's notice on the Senior Registrar, set the same down to be heard before a Divisional Court, and the case shall, unless judgment shall be delivered in the meantime, be heard by that Court upon the evidence that was before the judge.

No. 28 is the Law Reform Act. It deals with the branches of the Supreme Court, makes certain changes in their designation, provides for the abolition

of the offices of Chancellor and Chief Justices (except Chief Justice of Ontario) when vacancies occur, deals with the precedence of judges, etc. Every judge of the Supreme Court is made *ex officio* a judge of the division to which he is not appointed or does not belong. The Act also deals with the jurisdiction of county courts. It further makes provision as to agreements between solicitors and clients as to the remuneration of the former.

No. 29 is the County Court Judges Act. It deals with the tenure of office of those judges and their qualification.

General Sessions.—No. 30 is the General Sessions Act. Courts of general sessions have jurisdiction to try all criminal offences except homicide and the offences mentioned in s. 583 of the Criminal Code of Canada. The county judge is made the chairman of the Court, and by No. 31 he may try out of sessions and without a jury any person who is liable to be tried at the general sessions and who consents to be tried out of sessions and without a jury.

No. 32 amends the Surrogates' Courts Act in certain details. It *inter alia* provides that letters of administration are not to be granted to a person not resident in Ontario, and that probate is not to be granted to a person not resident in the British dominions unless such person shall give security.

No. 33 amends the Division Courts Act by providing that any action for wages of a workman may be entered and tried in the Court for the division in which the contract for hiring was made, notwithstanding any stipulation in the contract of employment or otherwise. The Act also deals with the procedure to be followed in the garnishing of wages and salary.

Juries.—No. 34 consolidates the law as to the qualifications, exemptions, disqualifications, etc., of jurors.

Arbitration.—No. 35 consolidates and amends in details the law on this subject.

No. 36 consolidates the law as to the appointment of chambers of arbitration.

Lunatics.—No. 37 is the Lunacy Act. It enables the Court to make declarations of lunacy, and may direct an issue to be tried where the evidence does not establish beyond reasonable doubt the alleged lunacy. After the expiration of one year from the date of the order declaring a person a lunatic, where the Court is satisfied that such person has become of sound mind, it may make an order so declaring, or may direct an issue to be tried. The Act also contains provisions for the management and administration of the estates of lunatics.

Replevin.—No. 38 is the Replevin Act. It is almost wholly a consolidation statute.

Dower.—No. 39 consolidates the law on this subject.

Libel and Slander.—No. 40 consolidates the law on this subject.

Seduction.—No. 40 is the Seduction Act. By s. 3 it is provided that in an action for seduction brought by the father or mother it shall not be

necessary to prove any act of service performed by the person seduced, but the same shall in all cases be presumed, and no evidence shall be received to the contrary; but if the father or mother of the person seduced had, before the seduction, abandoned her and refused to provide for and retain her as an inmate of the house, then any other person who might at common law have maintained an action for the seduction may maintain such action.

Crown Administrations.—No. 42 is the Crown Administration of Estates Act.

Witnesses and Evidence.—No. 43 is the Evidence Act; it is almost entirely a consolidating Act.

Distress.—No. 45 deals with the costs of levying distress.

Judges' Orders.—No. 46 relates to the enforcement of judges' orders.

Execution.—No. 47 consolidates and amends in details the law of execution. It sets out property which is exempt from seizure, deals with execution against municipal corporations, etc.

Creditors' Relief.—No. 48 is the Creditors' Relief Act. In the main it is a consolidation Act.

Absconding and Fraudulent Debtors.—No. 49 provides that if a person resident in Ontario departs therefrom with intent to defraud his creditors, or any of them, or to avoid being arrested or served with process, being then possessed of any real or personal property therein not exempt from seizure under execution, he shall be deemed an absconding debtor, and such property may be seized and taken by an order of attachment for the satisfying of his debts. The procedure for this purpose is prescribed.

No. 50 provides for the arrest of fraudulent debtors about to quit Ontario.

Habeas Corpus.—No. 51 is the Ontario Habeas Corpus Act, and is a consolidation Act.

Constitutional Questions.—No. 52—another consolidating Act—provides for a reference to the Court of Appeal or High Court for hearing and determining any question which the Lieutenant-Governor thinks fit.

Damage by Flooding.—No. 53 makes provision as to this.

Police Magistrates.—No. 54 prohibits the police magistrate of any city having a population of more than 18,000 from practising as a barrister or solicitor, or being engaged in any business while holding office.

Crown Attorneys.—No. 55 deals with the qualification and appointment of Crown attorneys.

Bulls running at large.—No. 56 provides that no bull over the age of ten months shall be permitted to run at large. The owner of any bull running at large contrary to this provision is made responsible in damages for all injuries committed by it, and he is further made liable to a penalty not exceeding \$10 and costs.

Escheats and Forfeitures.—No. 57 consolidates the law on this subject.

Mortmain and Charitable Uses.—No. 58 is almost entirely a consolidation statute.

Investments by Trustees.—No. 59 is a consolidation Act.

Ferries.—No. 60 is a consolidation Act.

Millers.—No. 61 deals with the tolls to be taken for grinding and bolting grain, and with the marking of grain bags.

Marriage.—No. 62 amends the Marriage Act by enacting that a judgment declaring a marriage invalid is not to be made by the consent of parties or in default of appearance or pleading. The Court may of its own motion require both or either of the parties to be examined. Notice of the trial in such matters is to be given to the Attorney-General for Ontario, who may intervene.

Notaries Public.—No. 63 is a consolidation Act.

Pharmacy.—No. 64 amends the Pharmacy Act in certain particulars.

Companies.—No. 66 enables conditions to be imposed in letters-patent of incorporation.

Guarantee Companies.—No. 67 enables the bond of a guarantee company to be accepted in lieu of a bond with sureties.

Railways.—No. 68 provides for the question as to the working of street railways on Sunday in cities with a population of over 50,000 being submitted to the electors. No employee is to be required or permitted to work for more than six days of ten hours each in any one week, nor upon any Sunday when he worked the previous Sunday.

Nos. 69-72 deal with subsidies to certain railways.

Municipalities.—No. 73 amends the Municipal Act in a number of details.

No. 75 prohibits the council of any municipality granting, with certain exceptions, franchises, etc., until the by-law setting forth the terms, conditions, and duration of the proposed grant has been submitted to and received the approval of the electors.

Statute Labour.—No. 77 deals with statute labour in unorganised townships.

Municipal Drainage.—No. 78 deals with proceedings to set aside by-laws, etc., relating to drainage work.

Municipal Light and Heat.—No. 79 enables municipalities to produce and supply steam and hot water for heating.

Public Libraries.—No. 80 is mainly a consolidation Act. Travelling libraries may be established and maintained.

Motor Vehicles.—No. 81 amends the law as to motor vehicles. It provides, *inter alia*, that no motor vehicle shall pass or attempt to pass at a greater rate of speed than four miles an hour a street car which is stationary for the purpose of taking on or discharging of passengers. It also contains provisions as to proceedings for violations of the Act. In the event of a third or subsequent conviction the motor vehicle driven by the person convicted is to be seized, impounded, and taken into the custody of the

law for three months, and the costs of storage are made a lien upon the vehicle. If, however, the owner of the vehicle gives sufficient assurance to the convicting magistrate that the vehicle shall not be used upon a public highway during the period of impoundment, it may be delivered up; but if it shall be used during that period, it is to be deemed to be used without a permit. The Act contains a further provision that in the event of the employer of a person driving a motor vehicle for hire, pay, or gain being in the vehicle at the time of any offence against the Act being committed, he, as well as the driver, is made liable for the offence.

Liquor Licences.—No. 82 enacts, *inter alia*, that licences are not to be issued for premises not having all the tavern accommodation required by law. A penalty is imposed on every tavern-keeper failing or refusing to obey the written directions of a Provincial Inspector as to accommodation. In proceedings instituted in respect of liquor being supplied to a person under the age of twenty-one, the minor may be compelled, under pain of imprisonment, to disclose the name of the person who supplied him. Liquor in transit may be seized where the officer believes that it is intended to be sold or kept for sale in contravention of the Act. Vehicles on the highway and lands may be searched where the officer believes that there is liquor intended for sale in violation of the Act therein or thereon. Sample and commission licences may be granted.

Private Detectives.—No. 83 requires private detectives to be licensed, but there is a saving as to the employees of duly licensed private detectives. A licensed private detective is responsible for the conduct of his employees. The Act is not to apply to barristers, solicitors, or their employees.

Public Health.—No. 85 amends the Public Health Act by enabling the Provincial Board to make regulations for the prevention or mitigation of disease, not merely, as formerly, when the Province is threatened with any formidable epidemic, endemic or contagious disease in man or animals, but at any time. Notice of the existence of infectious or contagious diseases is to be given.

Dairy Products.—No. 86 provides for the registration of creameries, cheese factories, etc. Insanitary premises may be ordered to be closed.

Egress from Public Buildings.—No. 87 requires that in public buildings all doors are to open outwards. Cinematograph exhibitions are to be licensed, and are made liable to police inspection.

Education.—No. 88 is the Department of Education Act. It consolidates the powers, etc., of the Minister of Education.

No. 89 is the Public Schools Act, and is largely a consolidating statute, dealing with the whole subject of public elementary education.

No. 90 provides for the establishment of continuation schools.

No. 91 makes provision as to high schools. Classes in military instruction may be established. Only such text-books may be used as are authorised by the Regulations.

No. 92 consolidates the law as to truancy and non-attendance of children at school, the appointment of truancy officers, etc.

No. 93 makes provision as to school sites.

No. 94 relates to the formation and duties of municipal boards of education.

No. 95 amends in detail the University Act of 1906.

No. 96 is the Veterinary College Act. It provides for the appointment of a Principal and officers, as to the course of study, the rights and standing of graduates, etc.

6. PROVINCE OF QUEBEC.

[*Contributed by* EDWARD MANSON, ESQ.]

Acts passed (Public, Private, and Local)—180.

Public Utilities Commission (No. 16).—This Act empowers the Lieutenant-Governor in Council to appoint a "Public Utilities Commission" of three members, and invests such a Commission with a wide jurisdiction, including general supervision and power of inquiry and inspection. "Public utility" means "every corporation other than a municipal corporation, firm, person, or association of persons, the businesses and operations whereof are subject to the legislative authority of the Province, their lessees, trustees, liquidators, or receivers appointed by any Court that now or hereafter own, operate, manage, or control any system, works, plant, or equipment for the conveyance of telegraph or telephone messages, or for the conveyance of travellers or goods over a railway, street-railway, or tramway, or for the production, transmission, delivery, or furnishing of light, heat, or power either directly or indirectly to or for the public."

Homesteads (No. 30).—The policy of protecting the home, which has found so much favour in Canada and Australia, is here extended to exempt the homestead, beds, bedding, wearing apparel, and necessary chattels from seizure and execution for debt in a number of particular cases.

Workmen's Compensation (No. 66).—"Accidents happening by reason of or in the course of their work to workmen, apprentices, and employees engaged in the work of building, or in factories, manufactories, or workshops, or in stone, wood, or coal yards, or in any transportation business by land or water, or in loading or unloading, or in any gas or electrical business, or in any business having for its object the building, repairing, or maintenance of railways or tramways, waterworks, drains, sewers, dams, wharves, elevators, or bridges, or in mines or quarries, or in any industrial enterprise in which explosives are manufactured or prepared, or in which machinery is used moved by power other than that of men or animals" are to entitle the person injured or his representatives to compensation in accordance with the following scale :

- (1) Absolute and permanent incapacity, a rent equal to 50 per cent. of the employee's yearly wages.
- (2) Permanent and partial incapacity, a rent equal to half the sum by which the employee's wages have been reduced in consequence of the accident.
- (3) Temporary incapacity, to one-half the daily wages received at the time of the accident.

The capital of the rents is not, however, to exceed \$2,000.

Accidents in agricultural industries or navigation by means of sails are not included in the Act.

The above scale applies only between employer and employee, and does not affect the employee's common law right against third persons. No contracting out is to be allowed.

MINOR MISCELLANEOUS ACTS.

Bar of Quebec, Act amended (No. 52).

Companies, clerical errors in letters patent creating, may be amended (No. 60).

Dentists, law as to, amended (No. 56).

Education, school districts, etc., amended (No. 33).

Intoxicating Liquors, amended (Nos. 17, 18, and 19).

Mining, law amended (No. 27).

Pensions of Public Officers, amended (No. 15).

Physicians and Surgeons, Medical Act amended (No. 55).

Public Health, amended (No. 49).

Public Lands and Forests, sale of, amended (No. 24).

Succession Duties, amended (Nos. 21 and 22).

Sunday Observance, amended (No. 51).

Trade Disputes, amended (No. 32).

7. NEWFOUNDLAND.

[Contributed by EDWARD MANSON, Esq.]

Acts passed (Public, Private, and Local)—40.

Arbitration (No. 1).—The Board of Trade may appoint Committees of Arbitration and also Committees of Appeal for settling such matters in difference as are voluntarily submitted to them. An award is to have the effect of a judgment of the Supreme Court.

Pharmacy (No. 4).—A board called the Newfoundland Pharmaceutical Society is constituted to make rules for holding examinations for druggists, and candidates passing are entitled to be registered as qualified druggists. No person unless so registered may sell drugs. All poisonous drugs—a list of which is scheduled—must be labelled "Poison."

Trade Unions (No. 6).—Trade union here means “any combination whether temporary or permanent for regulating the relations between workmen and masters or between workmen and workmen or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business.” Trade unions may be registered under the Companies Act, 1899. The mode of registering is prescribed by s. 13. The Imperial Act, 38 & 39 Vict. c. 36, entitled the Conspiracy and Protection of Property Act, 1875, and the Trades Disputes Acts, 1906, are adopted, and are to apply to all trade unions registered under the present Act.

Marriages (No. 11).—Any duly appointed commissioner, staff officer, or captain of the religious society called “The Salvation Army,” appointed for the purpose and duly licensed by the Governor, may solemnise marriages under No. 133 of the Consolidated Statutes.

Railways.—No. 12 provides for the extension of the railway system of the Colony.

Lady Barristers (No. 16).—This Act, after reciting that “it is desirable that women should not be excluded from practising at the Bar, nor from being enrolled as solicitors of any Court in this Colony,” goes on to enact that where in No. 54 of the Consolidated Statutes (Second Series), entitled “Of the Law Society Barristers and Solicitors,” the word “person” occurs, it is to be held to extend to and to include a female person, “so as to confer upon all women the right to be entered as clerks, admitted as law students, enrolled as solicitors, and called to the Bar, and to exercise fully all the rights and to impose upon them all the obligations which are conferred and imposed upon men under the provisions of the said chapter.”

“Royal Mercy” (No. 17).—His Excellency the Governor is hereby empowered to remit any penalty or forfeiture on a convicted offender, and to extend the Royal mercy to any person who may be imprisoned for non-payment of any sum, though such sum may be in whole or part payable to some party other than the Crown.

Agriculture (No. 18).—For the encouragement of agriculture the Minister may pay out of any moneys in his hands for the following :

- (1) The compilation of agricultural or farm notes for the local press.
- (2) The delivery of lectures on agriculture throughout the Colony.
- (3) The compilation of an agricultural primer for schools.
- (4) The encouragement of cold storage in agricultural localities.
- (5) Salaries of experts giving instruction in the cutting and drying of peat.

Woollen Manufacture (No. 19).—A premium of 5 per cent. is granted—for the encouragement of such manufacture—on all wool imported into the Colony, and on all wool raised and manufactured into wearing apparel, blankets, rugs, etc., in factories where more than ten persons are annually employed.

Discovery of Minerals (No. 21).—Any person who makes any discovery

of minerals in the Colony, on making application for a licence to work them may file a claim with the Minister of Agriculture and Mines, who is to give notice of such claim in the *Royal Gazette* and call upon all persons opposing it to give notice of objection. If no objection is notified before the expiration of sixty days, the claimant is to be deemed the true first and original discoverer.

Cold Storage.—No. 31 authorises the Governor in Council to guarantee persons, firms, or companies engaged in the cold storage business on certain terms.

MINOR MISCELLANEOUS ACTS.

Dentists Act, 1906, amended (No. 3).

Education. The Education Acts of 1903 and 1905 amended (No. 9).

Intoxicating Liquors. The Act of 6 Ed. VII. No. 17 amended (No. 5).

Magistrates, jurisdiction of stipendiary, under s. 4, No. 5, of 1 Ed. VII. extended (No. 15).

8. BERMUDA.

[Contributed by EDWARD MANSON, ESQ.]

Acts passed—33.

Banks (No. 4).—Every bank is to file its charter or certificate of incorporation: note issues are regulated, and yearly statements of accounts are required to be published.

Jurors (No. 5).—The qualification of jurors is prescribed; jury lists are to be published and there are provisions for the service of summons to serve on juries, for empanelling juries, for challenges, and for trials before special juries.

Conveyancing and Law of Property (No. 7).—This is the principal Act of the session. It follows substantially the lines of the English Conveyancing and Law of Property Acts, 1881 and 1882.

Police (No. 8).—The police force of the Colony is reorganised.

Pensions (No. 10).—Pensionable offices are defined, and the terms on which pensions are granted prescribed. Every public officer must retire at sixty if called upon to do so by the Governor in Council.

Pounds—Cattle and Dog (No. 11).—The pound—which is, with us, a decayed institution—is still flourishing in Bermuda. This is a consolidation of the law. A commissioner, that is a commissioner appointed under the Out Islands Administration Act, 1908, may authorise the erection of pounds and appoint a pound keeper. Impounded animals must be furnished with food.

Stallions are not to be at large on any public highway, or place of public resort, and if so found may be impounded. Dogs are also dealt with. Any dangerous or savage dogs straying on the highway may be detained by a

peace officer. The owner of a dog is to be liable in damages for injury to any animal by his dog, but the scienter doctrine is not abolished; the person seeking damages must show a mischievous propensity in the dog or negligence by the owner.

Squatters.—Magistrates are given power where squatters have taken possession of land without any probable claim or pretence of title to order them to deliver up peaceful possession of such land, crops, and animals, if any.

Slander (No. 24).—Words imputing adultery, unchastity, fornication, incest, incontinence, or drunkenness are made actionable without proof of special damage.

Printing of Papers and Books (No. 25).—Every person printing any paper or book in the Colony must put his name and place of abode or business upon the first or last leaf of the book or newspaper, and must preserve at least one copy with the name of the person who has employed him to print it.

A penalty not exceeding £200 is imposed on any person publishing any drawing, painting, print, photograph, or representation of any kind of a treasonable, seditious, blasphemous, immoral, indecent, or obscene character.

Emigrant Labourers' Protection (No. 26).—Contracts for emigrant labour must be in writing and executed by all parties before a judicial officer. Before execution the terms of the contract must be explained to the labourer. Certain conditions as to free board and lodging and wages are to be implied, and every employer must furnish the Governor in Council with guarantees for the due performance of the contract.

MISCELLANEOUS MINOR ACTS.

Coroners (No. 6).—This is an Act consolidating the law.

Hackney Carriages (No. 15).—To be registered and drivers licensed.

Hospitals.—No. 30 amends the Act of 1906.

Hurricanes Relief (No. 28).—The Act of 1908 amended.

Interpretation (No. 1).—Interpretation Acts, 1907 and 1908, amended.

Magistrates.—No. 33 amends the Act of 1896.

Marriage (No. 27).—The law is amended in a number of particulars.

Public Authorities Protection.—No. 21 generalises and amends the law on this subject.

Public Libraries.—No. 14 provides for trustees of these at the several out islands of the Colony.

Quarantine.—No. 15 adds to the number of quarantinable diseases.

Sponges.—No. 32 amends the Act of 1898.

Supply (No. 2).

Tariff Reform (No. 3).

X. WEST INDIES.

1. THE BAHAMAS (1910).

[Contributed by HARCOURT MALCOLM, ESQ., on behalf of the
Bar Association.]¹

Acts passed—5.

After the large and important outputs of the Legislature during the past few years, it might have been anticipated that there would be some falling off during the Session of 1910, as it was the last one of the late General Assembly, which was dissolved by Proclamation on June 7—only sixteen days before its dissolution would have taken place by effluxion of time. The financial condition of the Colony, coupled with the moribund state of the House of Assembly, has caused the most unproductive and colourless Session of many a year. The total number of Acts passed is only five, and none of them, except the Census Act, is of any interest. It is true that eight other Bills were introduced dealing with such important subjects as the creation of a Court of Appeal; the compilation of a new edition of the Laws (both the same Bills which were considered and postponed in the Session of 1909); the extension of magisterial jurisdiction; the regulation of the sale of poisons and drugs; and the provision of pensions to the widows and children of deceased public officers, but none became law.

I append (1) a *résumé* of all Acts passed; (2) a return showing origin and fate of Bills.

Supply (No. 1).—The Appropriation Act, 1910, appropriates the sum of £21,628 9s. 5d. for the performance of public works and for other services.

Expiring Laws (No. 2).—The Expiring Laws Continuance Act, 1910, continues two Acts in force for ten years.

Evidence of Statutes (No. 3).—The Evidence (British and Colonial Statutes) Amendment Act, 1910, repeals s. 4 of the Evidence (British and Colonial Statutes) Act, 1909.

Cattle, Dog, and Pound (No. 4).—The Cattle Amendment Act, 1910, supplies certain omissions in the Cattle Act of 1909 by conferring authority for the erection, repair, and use of pounds; for the appointment of keepers; and for the regulation of fees. The cost of erecting public pounds is paid out of the Treasury, while owners of private pounds must erect them at their own expense.

Census.—No. 5 provides for the taking of the Census in 1911, and at subsequent periods. The Act is of a permanent nature.

¹ At the Annual Meeting of the Bar Association it was resolved: "That the Association, under the presidency of the Chief Justice, constitute the local branch of the Society of Comparative Legislation in London. That an annual meeting of the Local Branch of the Society of Comparative Legislation be held as soon as it conveniently can be after the termination of the Annual Session of the Legislature."

RETURN SHOWING ORIGIN AND FATE OF BILLS.

Place of Origin.	Number of Bills Introduced.	Number of Bills not passed.	Number of Bills that became Acts.
HOUSE OF ASSEMBLY :			
Government	10	7	3
Select Committees	3	1	2

2. BARBADOS.

[Contributed by WALLWYN P. B. SHEPHEARD, ESQ.]

Acts passed (1909)—29. Additional Acts passed (1908)—8.¹

1908.

Quarantine (No. 40).—The Quarantine (Further Amendment) Act, 1908, amends the principal Act, 1905, by enacting that there should be inserted in the Convention set out in the first schedule to the principal Act a new article requiring each colony party to the Convention to notify all the others as to the measures taken against arrivals from countries or colonies, within less than from ten to eighteen days' steam voyage, and not parties to the Convention, wherein the diseases of plague, cholera, smallpox, and yellow fever have appeared.

Sale of Spirituous Liquors (No. 45).—The Liquor Licences Act, 1908, repeals like Acts of 1890, 1900, and 1904, and consolidates the laws relating to the sale of spirituous liquors in thirty-three sections, under the following headings: Licences, licensing sessions, licence duty, transfers, signboards, temporary licences, disorderly conduct on licensed premises, entry and search of the licensed premises, hawking of liquor, adulteration, police proceedings, penalties, appeals, and duration of Act until March 31, 1910.

Places for Public Entertainment (No. 46).—The Licensed Places for Public Entertainment (Amendment) Act, 1908, enables the Governor in Executive Committee to exempt persons holding concerts, etc., from the provisions of the principal Act (1889), and such exempted persons to sell spirituous liquors during the entertainment subject to conditions as to time of sale, holding a licence, and otherwise complying with the provisions of the Licensing Acts.

1909.

Trading Rates (No. 3).—The Interim Traders Act, 1909, enables traders to obtain temporary licences to trade from the parochial treasurer of the

¹ Acts are passed by the Governor, the Council, and the Assembly of Barbados, and are numbered consecutively for the calendar year.

parish upon payment of the licence duty fixed by an assessor in respect of the business carried on in the parish.

Chancery (No. 6).—The Chancery (Amendment) Act, 1909, amends the principal Act, 1906, and extends to holders of registered certificates of lien under the Sugar Industry Agricultural Bank Act, 1908, the powers given to like holders under the Agricultural Aids Act, 1905, and enables such holders, and other persons holding liens upon, or having an interest in any lands subject to a decree for sale by the Court and remaining unsold for two years from the date of the decree, to require the sale of the land by public auction to the highest bidder without reserve at the expiration of three months.

Sale of Spirituous Liquors (No. 8).—The Liquor Licences (Amendment) Act, 1909, requires the Licensing Board to issue witness summonses free of charge. All evidence before the Board is to be on oath. Provisions are made for the removal of the business from the licensed premises to others and the granting of druggist licences to sell still wines imported in bottle.

Quarantine (No. 16).—The Quarantine (Amendment) Act, 1909, repeals certain sections of the principal Act of 1905 and substitutes other provisions relating to inspection of vessels by the Health Officer on arrival in port, his decision as to condition of the vessel, its admission to pratique, and the landing of persons on board the same.

Rats (No. 20).—The Rat (Destruction) Act, 1909, provides for the payment of 1*s.* by the parochial treasurer of each parish to any person producing the head and tail of a rat, and the Act is to continue in operation until March 31, 1910.

The Christian Mission (No. 21).—The Christian Mission (Incorporation) Act, 1909, incorporates the persons named therein, being inhabitants of Barbados and associated together for the purposes therein set forth, into one body corporate and politic in deed, name, and law, by the name of "The Christian Mission," with perpetual succession and a common seal and in whom all property whatsoever belonging to the Mission is to vest. Powers of management, etc., are given by the Act.

Statute Laws Revision (No. 22).—The Statute Laws (New Edition) Act, 1909, appoints the Attorney-General and Solicitor-General of the Island Commissioners for the purpose of preparing a new and revised edition of the Statute Laws of the Island and making arrangements for the printing and publication thereof, and gives power to the Governor to appoint a substitute for either Commissioner unable to fully discharge the commission. In preparing the new edition the Commissioners are to have power to alter amended Acts in conformity with the amending Act; to consolidate into one Act all Acts relating to the same subject and record in such Act the date of the latest in date of the Acts included therein; to embody into one Act all public pensions and annuities; to omit (*a*) all Acts and parts of Acts expired, repealed, or spent; (*b*) all repealing Acts; (*c*) all amending Acts of

which the amendments have been embodied in the consolidating Act; (d) all schedules of repealed Acts; (e) all parts of title or preamble of any Act as relate solely to Acts omitted from the existing edition or to be omitted from the new edition; (f) all preambles of Acts which can be conveniently omitted; (g) the dates when Acts are to come into operation, when such omission can be conveniently made; to alter the sections of Acts by combination or division of sections; to divide and rearrange Acts into parts and divisions; to alter the order of and re-number the sections of Acts; to transfer sections from one Act to another more appropriate Act; to add or vary the short titles to the Acts; to do all other things relating to form and method necessary for the perfecting of the edition; to compile a full and complete Index of all Acts in the edition; to prepare an Appendix of all consolidated Acts showing by reference the Acts whence such consolidated Acts were derived, and another Appendix showing the Acts in the existing edition omitted from the new edition.

The powers conferred on the Commissioners are not to be construed as giving them any power to alter or amend the matter or substance of any Acts.

Every copy of the new edition when printed is to be stamped with the seal of the Island, and thereupon, after proclamation by the Governor duly published in the *Official Gazette*, the new edition is to become in all Courts of Justice the only Statute Book of Barbados up to the date of the latest Act included therein.

Volunteer Forces (No. 25).—The Volunteer (Amendment) Act, 1909, is consolidated with and amends like Act of 1901 and contains various provisions for officers or men joining the Reserve Forces and also for officers or men of the Territorial Force of England visiting the island to be temporarily attached to the island Force.

Immigration of Paupers (No. 29).—The Immigration of Paupers (Prevention) Act, 1909, enables the Harbour and Shipping Master to hold inquiries as to second and third-class passengers and detain for re-embarkation any persons, not being natives of Barbados, who shall appear to be unable to maintain themselves by reason of physical or mental infirmity. Penalties on refusal by the master of the ship to obey the order for re-embarkation are enforceable against the ship by maritime lien, and power is given to the Governor in Executive Committee to make all necessary regulations for carrying out the provisions of the Act.

3. BRITISH GUIANA.

[Contributed by SIR T. CROSSLEY RAYNER, K.C., *Attorney-General*.]

During the year thirty Ordinances were passed. Of these, five, Nos. 12, 13, 14, 15, and 25, are local and private Ordinances, and of these, three, Nos. 13, 14, and 15, are what in England would be described as public

Ordinances of a local character. The remainder are public general Ordinances.

The more important Ordinances are the following :

Customs Duties (No. 1) and **Tax** (No. 2) are the Ordinances passed annually under which the customs duties and inland revenue are collected.

Fire and Life Insurance (Law Governing) (No. 3).—It is exceedingly doubtful whether under the Roman-Dutch law, the common law of British Guiana, contracts of fire and life insurance can be enforced, and to remedy this state of things, there being large numbers of such contracts entered into in this Colony, this Ordinance was passed, which enacted that “the law administered by the High Court of Justice in England for the time being, so far as the same shall not be repugnant to or in conflict with any Ordinance now in force in the Colony,” shall in all questions of fire and life insurance be administered by the Courts of the Colony. Under the Ordinance English statutes relating to insurance will apply to the Colony.

Quarantine (No. 5).—This Ordinance amends in several particulars the Quarantine Ordinance passed in 1908 (No. 14 of 1908) in accordance with the recommendations of the Central Quarantine Authority for the West Indies, and which all the colonies parties to the Quarantine Convention bound themselves to adopt. This Ordinance has since been repealed by a later Ordinance (No. 4 of 1910) and consolidated with other amendments.

Epidemic Diseases (No. 6).—This Ordinance gives power to take special measures of precaution in case the Colony is threatened with an invasion of a dangerous epidemic disease which the ordinary law is inadequate to deal with. The idea is to have the means of at once dealing with any dangerous disease which makes its appearance, instead of having to wait till the Legislature can give the necessary special powers, and to avoid delay, during which the disease might make serious headway.

Petroleum (No. 8).—This Ordinance, which amends one passed in 1872, has been passed in consequence of the increasing use of motor-cars and motor-boats in the Colony, in order to permit motor spirit being more easily obtained than was formerly the case. Petrol and similar oils, in view of their dangerous character, were required to be stored in magazines away from towns, and only a very small quantity could be kept by a private person on his premises. Under the Ordinance regulations can be made permitting a sufficient supply of petrol to be kept on any premises if proper precautions are taken against fire and explosion.

Deceased Persons' Estates (No. 9).—This Ordinance amends the law with regard to the administration of deceased persons' estates. It repeals and re-enacts with amendments an Ordinance passed in 1887 for the same purpose. The most important amendments in the law are the following :

(a) Provision is made that when any person dies intestate without leaving any child, the surviving wife or husband of such person shall be entitled to half of the deceased person's estate, subject however to any ante-nuptial contract or marriage settlement made between them.

(b) It provides for wills being deposited in the Registrar's Office, and for proof of due execution, a proceeding somewhat analogous to probate in England, though such deposit, unlike probate in England, is not necessary to enable the executor to administer the will. The executor who fails to deposit a will only incurs a pecuniary penalty; the non-registration does not affect his powers of dealing with the estate under the will. A later section (11) provides that deposit of a will with an affidavit of due execution shall have in the Colony the same effect as probate in common form in England. This is to enable such deposit to be recognised as probate in England under the Colonial Probate Act, 1892.

(c) Provision is made for compelling the witnesses to a will to make an affidavit of due execution upon being paid the same fee as they would have received had they been summoned as witnesses in an action. Cases have occurred in which witnesses have refused to make an affidavit unless paid an exorbitant sum.

(d) An important alteration is made in the law as to the administration of intestate estates. Just as no probate is necessary for the administration of a will, so no letters of administration are necessary to enable the person who, under the Roman-Dutch law, is the heir of the intestate, to administer his estate. Formerly when the heir had "adiated" the estate, that is, entered upon the administration, he was liable for all the debts of the deceased, whether there were assets or not, and a period of six months (the *jus deliberandi*) is allowed the heir to decide whether he would adiate or not, and no person is presumed to have adiated the estate until he had done something to show that he had done so. This led to great delay and loss in administering intestate estates, and the Ordinance provides that every heir shall be presumed to have adiated the estate, unless he renounces or declines the inheritance, in which case, like an English administrator, he is only to be liable for the debts of the deceased to the extent of the assets.

(e) Provision is made for enabling the Court to require security to be given by an executor or administrator, and all executors and administrators are required to file their accounts in Court within a year, and power is given to any person interested in the estate to apply to the Court to compel an executor or administrator to account, or for his removal.

(f) Provision is made (in pursuance of a reciprocal arrangement between the British Government and that of the United States) for the United States Consul to administer the property of a citizen of the United States who dies in British Guiana, if he has no heir or executor in the Colony.

Veterinary Surgeons (No. 10).—This Ordinance provides for the registration of veterinary surgeons, and forbids any one to call himself a veterinary

surgeon unless registered under it, and no person not registered can recover fees for professional services.

Young Offenders' Detention (No. 11).—This Ordinance was passed to extend to this Colony the Borstal System for the treatment of young offenders, and is based on Part I. of the Prevention of Crime Act, 1908.¹ The Ordinance provides for the establishment of a "Labour Institution" (already established), to which young offenders can be sent. They must be between the ages of sixteen and twenty-five, the age up to which an offender can be committed being later than in England, where the limit is twenty-one. In England commitment to a Borstal Institution can only be made on a conviction on indictment, but the Ordinance permits an order to be made either on a conviction on indictment or on a summary conviction, but in the latter case the offender must have been convicted a second time of certain specified offences, and the order must be approved by the Governor. In this Colony many offences can be dealt with summarily which in England can only be dealt with on indictment, and much of the usefulness of the measure would be lost if orders could only be made on indictment. The other provisions of the Ordinance are the same as in the English Act.

Probation of Offenders (No. 16).—This Ordinance, like the one last mentioned, is an attempt to introduce into this Colony the latest methods of dealing with offenders with the view of reclaiming them before they become hardened criminals. It is based on the Probation of Offenders Act, 1907,² and introduces into this Colony the system in force in England under which offenders can be released on probation on certain conditions as to reporting themselves and being of good behaviour, and provides for the appointment of probation officers to look after them.

Carrion Crows (No. 18).—Until lately carrion crows were thought to be useful as scavengers, and were protected from destruction, it being an offence to kill them. But it is now agreed that they are dangerous as disseminators of disease by fouling water, and that any usefulness they possess is more than counterbalanced by the risk of spreading infection. In 1908 an Ordinance (No. 4 of 1908) was passed allowing them to be killed in towns, but continuing to protect them in country places. This Ordinance now withdraws all protection, and permits them to be killed like vermin in any part of the Colony.

Sentences of Death (No. 20).—This Ordinance, following s. 103 of the English Children's Act, 1908, abolishes sentences of death on children, but the age up to which such a sentence could be passed was fixed at fourteen, instead of sixteen as in England, on account of the earlier development of children in the tropics than in England. But by an Ordinance passed in 1910 (No. 18 of 1910) the age was raised to sixteen so as to bring the law of this Colony on this subject into conformity with that of England and other colonies.

¹ 8 Ed. VII. c. 59.

² 7 Ed. VII. c. 17.

Political Constitution (No. 24).—This Ordinance makes certain amendments in the constitution of the Colony. It makes any person who has failed to obey an order of the Court to pay over any money received by him in a fiduciary capacity incapable of being a member of the Court of Policy or Combined Court, and it reduces the property qualification necessary to enable a person to be elected a member of those Courts, but requires that such property shall be unencumbered by any mortgage. It also reduces the income qualification for a voter from \$480 (= £100) a year to \$300 (= £62 10s.). It also enables a candidate to withdraw his candidature between the nomination and the polling day, and enables the returning officer to declare the remaining candidate elected, so as to save the cost of an unnecessary poll.

Employers and Labourers (No. 26).—This Ordinance provides for the punishment of persons who engage as labourers in the goldfields or forests in the interior, and after receiving an advance of wages from their employer abscond without fulfilling their contract. This Ordinance has been rendered necessary by the development of the interior of the Colony, chiefly gold and diamond mining, and rubber and balata collecting, it being found that labourers who have received advances to go to the interior to work sometimes abscond, and in most cases it is useless to sue them for the return of the advance. The Ordinance provides that such persons may be fined or imprisoned, but provision is made to allow them an opportunity of completing their contracts if they wish to do so.

Habitual Criminals (No. 27).—This Ordinance is taken from Part II. of the Prevention of Crime Act, 1908,¹ and is an attempt to deal with the problem of the habitual criminal. It provides for preventive detention after the expiration of a term of penal servitude or imprisonment, but it follows the lines of the draft Bill as originally submitted to the Imperial Parliament, rather than the Act as subsequently passed, in that the preventive detention is indefinite, and its duration depends upon the conduct of the criminal, and is not for a definite period as in the English Act. In other respects the Ordinance follows the English Act.

Animals (Importation of Diseases) (No. 30).—This Ordinance enables importation of animals to be forbidden from places where diseases are known to exist, or allowed only on such conditions as will prevent the introduction of disease. It is partly based on s. 25 of the Diseases of Animals Act, 1894.²

The five private Ordinances comprise one (No. 12) for the reduction of the capital of a local company; one (No. 15) to vary a contract between the Government and a local railway company; one (No. 25) to incorporate a Roman Catholic Sisterhood and two relating to the Town Council of Georgetown, the capital of the Colony. Of these latter, one (No. 13) reduces the

¹ 8 Ed. VII. c. 7.

² 57 & 58 Vict. c. 57.

qualification for the municipal franchise, and the other (No. 14) establishes a system of life insurance for the officials of the Town Council, so as to ensure some provision for their wives and children after their death.

4. BRITISH HONDURAS.

[*Contributed by* WALLWYN P. B. SHEPHEARD, ESQ.]

Ordinances passed—21.¹

Telegraphs (No. 1).—The Telegraph Ordinance, 1909, makes it a misdemeanour, with penal consequences, for any Government telegraphic official to disclose the contents of any telegraphic message entrusted to the Government telegraphic department for transmission and for any person without lawful authority to tap telegraph wires in order to intercept messages.

Chicle (Export Duty) (No. 3).—The Chicle (Export Duty) Ordinance, 1909, authorises the levying of one half-cent per pound on all chicle exported from the Colony.

Honduras Government Loans (No. 4).—The General Loan and Inscribed Stock Ordinance, 1909, regulates the procedure and method to be followed by the Government in carrying out Government loans through the Governor, or the Crown Agents acting on his behalf. The loans are to be raised either by debentures or by British Honduras Inscribed Stock, or partly by debentures and partly by inscribed stock, and the principal moneys and interest secured by the debentures or stock are thereby charged upon the general revenue and assets of the Colony. The Ordinance contains detailed provisions for the issue of debentures in London and the issue in England of inscribed stock under the provisions of the Colonial Stock (Imperial) Act, 1877. The application of the Ordinance is limited to raising loans in England.

Postal Regulations (No. 10).—The Post Office Ordinance, 1909, is consolidated with like Ordinance, being Chap. 78 of the Consolidated Laws. It empowers the Postmaster of the Colony to detain for the purpose of examination by the officer of customs any letters or postal packages from abroad which in his opinion may contain dutiable articles, in order that the duties may be collected before delivery of the letters, etc.

Public Officers' Guarantee Fund (No. 16).—The Public Officers' Guarantee Fund Ordinance, 1909, establishes the Public Officers' Guarantee Fund: provides for its administration, regulates the fidelity securities to be given by officials, their contributions to the Fund, the keeping of the accounts, and the payment of claims on the Fund.

¹ Ordinances are passed by the Governor with the advice and consent of the Legislative Council.

Tariff (No. 18).—The Tariff (Amendment) Ordinance, 1909, amends the tariff by making shades, electroliers, standards, and pendants for electric lighting dutiable articles, and by exempting from duty the baggage, luggage, and personal effects of foreign consular officers on their first arrival in the Colony.

Criminal Law (No. 20).—The Death Sentence (Children's) Abolition Ordinance amends the existing criminal law (Chap. 24A, the Consolidated Laws) by providing that sentence of death be not pronounced against any person under sixteen years of age.

5. JAMAICA.

[*Contributed by* ALBERT GRAY, ESQ., K.C.]

Laws passed—42.

Tariff.—The duty on importation of cement, steel bars, wire cloth, wrought iron and steel work for buildings, also that on artificial limbs, crutches, etc., is removed (No. 2). In regard to the former class of goods, perhaps even the latter, we may see the effects of the great earthquake.

Elementary Education.—No child is to be received in a school before the age of six, or to be kept after his fourteenth, or in some cases his fifteenth, birthday. No Government grant is given where any fees are taken for tuition during school hours (Law No. 6).

Dogs.—The provisions of Law 24 of 1890 which prevents the importation of diseased cattle are extended to dogs, rabies being added to the cattle diseases mentioned in the Law (No. 19).

Legitimation.—Any child born before the marriage of his parents is legitimated by the marriage. The next provision of Law 34 has a Hibernian flavour: "The issue of any such legitimate child who has died before the marriage of his or her parents shall take by operation of law the same real and personal property which would have accrued to such issue if the parent had been born in wedlock."

Vagrancy.—By Law 35 vagrants on conviction, instead of being sent to prison, may be detained in prison-farms or other institutions approved by the Governor. The term is to be not less than two months or more than three years.

Judicature.—The Supreme Court is constituted under Law 42 of the Chief Justice and one puisne judge; but when the Court sits as a full Court the judge of the Kingston Court is added for the nonce.

The other Laws deal with appropriation, small amendments of previous Laws, and matters of private legislation.

6. TRINIDAD AND TOBAGO.

[Contributed by WALLWYN P. B. SHEPHEARD, ESQ.]

Ordinances passed (1909)—37.¹

Agriculture: Livestock (No. 1).—The Fertilisers and Feeding Stuff Ordinance, 1909, applies to cattle, under which expression are included bulls, cows, heifers, calves, sheep, goats, swine, horses, mules, and asses; also to poultry, and to both wholesale and retail sales. It requires all dealers in fertilisers and foodstuffs, whether made in the Colony or imported, to take out an annual licence, which is to be issued only to persons resident in the Colony. Such licensed dealers must, on the sale of a fertiliser, give to purchasers an invoice stating the name of the article, and the respective percentage (if any) of nitrogen, soluble phosphates, insoluble phosphates, and potash contained in the article, and such invoice is to be deemed a warranty by the seller of the accuracy of the percentages stated in the invoice within prescribed limits of error. On the sale of foodstuffs for cattle or poultry the invoice must state the name of the article, and whether it has been prepared from one substance or seed, and, if artificially prepared otherwise than by being mixed, broken, ground, or chopped, the percentages (if any) of oil and albuminoids contained in the article, and such invoice is to be deemed a warranty that the stated percentages are correct within prescribed limits of error. If articles be sold as foodstuffs under a description implying their preparation from any particular substance, or production from any particular seed, or mixture of seeds, without indication of being compounded with any other substance or seed, the seller shall be deemed to warrant that the foodstuffs are prepared from those substances only or are the product of those seeds only, and are suitable to be used as such foodstuffs for cattle or poultry respectively. Statements made by sellers either in invoices, circulars, or advertisements as to chemical or other ingredients in fertilisers, or as to the nutritive or other ingredients in foodstuffs, are to be deemed warranties by the sellers. Fertilisers or foodstuffs containing ingredients mixed at the request of the purchaser are to be invoiced with the percentages before such mixture, and with a statement that they have been mixed at the request of the purchaser. The Ordinance contains detailed provisions as to the appointment of analysts and official samplers, and enables the Governor to frame regulations for giving effect to the Ordinance. It prescribes the penalties for fraud, the officials to institute prosecutions, and gives liberty of appeal to persons convicted.

Immigration (No. 3).—The Immigration (Amendment) Ordinance, 1909, is consolidated with and amends like Ordinances of 1905 and 1908, and in the

¹ Ordinances are made by the Governor with the advice and consent of the Legislative Council.

case of plantations wherein the mean death-rate is excessive restricts the further allotment of immigrants until the Protector of Immigrants is satisfied as to due regard to the health of allotted immigrants.

Steam Boilers (No. 4).—The Steam Boilers Regulation Ordinance, 1909, requires proper safety valves, steam pressure gauges, and water gauges to be attached to all boilers, and provides for the examination and issue of certificates by competent persons and production of the same to the inspecting officers appointed under the Ordinance. The provisions of the Ordinance are not to exempt any person from civil or criminal liability.

In the schedule are contained the forms of report of examination and certificate as to same and the condition of boiler.

Criminal Procedure (No. 5).—The Criminal Procedure (Amendment) Ordinance, 1909, is consolidated with and amends like Ordinances Nos. 2 and 53 (Revised Edition) and No. 14 of 1908. The Ordinance enables stipendiary justices of the peace to discharge prisoners in custody for an indictable offence, if the evidence offered by the prosecution seems insufficient to put the accused upon his trial, or, if such evidence warrants presumption of guilt, to send the prisoner for trial with power to admit to bail in bailable offences.

Sunday Shop Closing (No. 7).—The Sunday Closing Ordinance, 1909, makes it an offence with penalties and liability to imprisonment to open shops on Sundays, Good Friday, Corpus Christi and Christmas Day within the town of Port-of-Spain, with exemptions as to sale in shops of bread, milk, cooked food, and certain other provisions, coffins, newspapers, and as to guests and travellers in respect of hotels and licensed premises.

Sale of Produce (No. 8).—The Sale of Produce Ordinance, 1909, requires all dealers in licensable produce, which includes cocoa, coconuts, coffee, nutmegs, kola nuts, tonca beans, and rubber, to take out an annual licence in respect of the premises upon which the business is carried on. Licensed dealers are restricted from trading in uncured cocoa, coffee, kernel of coconuts, nutmegs, or tonca bean, and are also subject to various other restrictions, requirements, and penalties.

Firearms (No. 9).—The Firearms Ordinance, 1909, makes it unlawful for any person to carry or possess firearms without being licensed in conformity with the Ordinance; all persons trading in firearms must take out a licence. The Governor in Executive Council is empowered from time to time to prohibit by proclamation the carriage and sale of firearms and to order firearms to be delivered up.

Public Education (No. 13).—The Secondary Education Ordinance, 1909, regulates the management of the College established in Port-of-Spain for the promotion of Secondary Education, which is to be called "The Queen's Royal College."

Petroleum (No. 14).—The Petroleum Ordinance, 1909, regulates the carriage, discharge in port, storage, delivery, and sale of petroleum, under which term is included any product of petroleum, rock oil, Rangoon oil,

Burma oil, and any product of them, and oils made from petroleum, coal, schist, shale, peat, or other bituminous substance which when tested do not give forth an inflammable vapour at a temperature of 95° Fahrenheit; "dangerous petroleum" is petroleum whose vapour flashes at a temperature below 95° Fahrenheit, and its sale and use is subject to special restrictions. Provisions imposing penalties for offences in breach of the Ordinance with liability to imprisonment are contained in the Ordinance.

The Petroleum Ordinance, 1908 (No. 31), is repealed, with a saving of rights or liabilities accrued or incurred before, and proceedings pending at, the commencement of the Ordinance on June 24, 1909.

By the Petroleum (Drawback) Ordinance, 1909 (No. 15), persons using petroleum as a source of mechanical power are entitled to a reduction by way of drawback of duties.

Telephones (No. 17).—The Trinidad Consolidated Telephones (Limited) Ordinance, 1909, gives to the company, as the purchaser of the undertaking of the Commercial Telephone Company, powers to execute new works and maintain existing telephone systems subject to restrictions and conditions to be imposed from time to time by the Governor in Council, and to power for the Governor in Council in cases of emergency to take over the control of the whole service. The Government are to exercise general supervision and control by the appointment of electric inspectors.

The company is to pay to the Government 1 per cent. of its gross earnings in discharge of all taxation, except such as exists at the commencement of the Ordinance on July 31, 1909.

The schedule to the Ordinance fixes the maximum charges for telephonic communication.

Estate Duty (No. 19).—The Estate Duty Ordinance, 1909, is consolidated with and amends the like Ordinance, 1908, so that all estate duty payable shall be deemed a debt of the deceased person, and, in the absence of special directions in his will, be apportioned among the several beneficiaries under the will according to their proportionate interests. The amended schedule fixes the rates of estate duty at from 1 per cent. to 12 per cent., according to the principal values of the estates, whether outside or within the Colony, graduated from £100 to £10,000 and upwards.

Certain exemptions and abatements of duty in respect of the husband or wife and blood relations of deceased are set out in the schedule.

S. 30 of the principal Ordinance is repealed and the following section substituted: "The Royal Order-in-Council relating to Legacy and Succession Duty, 3rd February, 1851, except s. 32 thereof (which shall be deemed to apply to this Ordinance), the Legacy Duty Ordinance, No. 208 (Revised Edition), ss. 104 to 107 (inclusive) of Ordinance No. 99 (Revised Edition), are repealed." Then follows a saving clause.

The Ordinance is to commence as on the day fixed for the commencement of the principal Ordinance.

Marriage (No. 20).—The Marriage Ordinance, 1909, amends the like Ordinance, No. 59 (Revised Edition), and provides for the case of one of the parties being non-resident in the Colony.

Criminal Procedure (No. 23).—The Criminal Procedure Ordinance, 1909, amends the existing Criminal Procedure law by exempting persons under the age of sixteen years from sentence of death; and, if so sentenced, such persons are to be liable to be detained in prison during his Majesty's pleasure.

Land Taxes (No. 27).—The Land Charges Ordinance, 1909, amends the Land Charges and Land Taxes Ordinance, No. 204 (Revised Edition), by repealing s. 26 and substituting in lieu thereof another whereby lands or houses may be added to the assessment roll during its continuance in operation, and become subject to payment of taxes for the then current year and the preceding year or two years during which the assessment roll has been in operation.

By the Apportionment Ordinance, 1909, the like Ordinance No. 77 (Revised Edition) is amended in respect of Crown grants of land (not theretofore subject to land taxation) to persons who as grantees are to become liable to payment of the land taxes upon an apportionment basis fixed by the Ordinance.

Sale of Food and Drugs (No. 30).—The Food and Drugs Ordinance, 1909, amends like Ordinance No. 162 (Revised Edition) by substitutional words the effect of which is that no person shall sell to the prejudice of the purchaser any article of food or drug which is either not of the nature or not of the substance or not of the quality demanded by such purchaser; and also amends the Food and Drugs (Standard) Ordinance, 1905, by substitutional words that no person shall sell to the prejudice of the purchaser any article of food or drug which does not comply with the standard of purity fixed therefor under the amended Ordinance. (Then follow provisions as to penalties.)

Bankruptcy (No. 31).—The Bankruptcy Ordinance, 1909, amends like Ordinance, 1907, by substituting an official receiver appointed by the Governor for the receiver appointed by the Court.

Post Office (No. 32).—The Post Office Ordinance, 1909, is consolidated with like Ordinances Nos. 197 and 301 (Revised Edition), and amends the former by substituting the Convention of Rome, 1906, for the Convention of Washington of 1897. The insurance of parcels is to be deemed to be an insurance against loss, and not against damage due to faulty packing, and in the absence of fraud or wilful misbehaviour on their part officials are not to be personally or officially liable to legal proceedings in respect of loss to or delay in delivery of uninsured parcels or postal packets.

Wireless Telegraphy (No. 35).—The Wireless Telegraphy Ordinance, 1909, prohibits messages by wireless telegraphy from any merchant ship while that ship is in the territorial waters of the Colony otherwise than in

accordance with regulations made from time to time by the Governor and published in the *Royal Gazette*.

Mining Regulations (No. 37).—The Mines Regulation (Amendment) Ordinance, 1909, substitutes fresh regulations for owners of mines as to keeping plans of the mines, log of borings, and production to Inspector of Mines of such plans and logs, in lieu of the regulations provided by like Ordinance No. 13 of 1907.

7. THE WINDWARD ISLANDS.

(i) GRENADA.

[Contributed by EDWARD MANSON, ESQ.]

Ordinances passed—16.

Illiterate Persons Protection (No. 1).—By this Ordinance certain classes of documents of an important kind such as conveyances or purchases of land, leases and onerous contracts made or entered into by an “illiterate person”—that is, a person unable to write his name—must be officially attested; and before execution the official attester must explain the document to the “illiterate,” and is to refuse to attest unless the “illiterate” appears to understand the contents of it.

Company-Name (No. 2).—Such words as “King’s,” “Queen’s,” “Royal,” “Crown,” “Imperial,” or words suggesting Royal or Government patronage are not to be used by a company as part of its name without licence from the Governor.

Criminal Law (No. 9).—Sentence of death is not to be pronounced or recorded against a “juvenile offender,” but in lieu thereof the Court is to sentence the child or young person to be “detained” during his Majesty’s pleasure in such places and under such conditions as the Governor may determine.

Rats (No. 11).—Rats are now more than suspected of spreading the plague. This Ordinance gives power to the Governor in Council to make regulations for their destruction, and that of other vermin, and for minimising their number both on shore and on vessels in the waters of the Colony.

Estate Duty (No. 12).—Estate duty is granted on the lines of the Imperial Act, and provision made for its collection.

Medical Practitioners and Dentists (No. 13).—This is an Ordinance—of a kind now become very common—for getting rid of the “unqualified practitioner” or quack by establishing registers of duly qualified medical practitioners and dentists. The requisite qualification as prescribed and a certificate for registration must be obtained. A list of persons on the register is to be published every year in the *Government Gazette*.

Bastardy (No. 14).—Where the magistrate dispenses with the prepayment of Court fees by a woman complainant, he is empowered to order the putative father to pay such fees.

Bank Holiday (No. 16).—The Governor in Council may from time to time by Proclamation in the *Gazette* appoint a special day to be observed as a Bank Holiday.

MINOR MISCELLANEOUS ACTS.

Agriculture (No. 8).—A Board of Agriculture is constituted, with the Colonial Secretary as its President, for the purpose—mainly—of preparing an estimate of the probable expenditure of the Agricultural Department for the ensuing financial year.

Cocoa and Nutmegs.—No. 7 amends the law as to applications for licences for dealing in these articles.

Export Duties (No. 10) amended.

Schools.—No. 6 re-organises grammar schools and girls' high schools as Government schools of secondary education.

Supply (Nos. 5, 14).

(ii) ST. LUCIA.

[*Contributed by* WALLWYN P. B. SHEPHEARD, ESQ.]

Ordinances passed—12.¹

Companies (No. 4).—The Companies Ordinance, 1869, Amendment Ordinance, 1909, repeals a like Ordinance of 1908 and amends the principal Ordinance of 1869 by prohibiting the registration of any company under a name containing the words "Empire," "Imperial," "King's," "Queen's," "Royal," "Crown," or other words suggesting Royal or Government patronage without the permission of the Governor in writing.

Guarantee Fund (Public Officers') (No. 6).—The Public Officers' Guarantee Fund Ordinance, 1909, establishes a Guarantee Fund consisting of contributions from public officers and interest accruing on the investments of the fund. The Governor is empowered to require persons in the public service to give security. Contributors to the fund are released from this requirement unless the security required exceeds £500. All permanent officials are to pay to the fund entrance fees on their appointment and monthly contributions of one-twelfth part of 1 per cent. of the amount, not exceeding £500, of the required security. Existing public officials are to contribute to the fund, but the fund is not to be liable for defaults of any

¹ Ordinances are passed by the Governor with the advice and consent of the Legislative Council of St. Lucia, and are numbered consecutively for the calendar year.

official committed before his first contribution to the fund. The amount of any default by accounting officers is to be certified by the Auditor of the Windward Islands and paid to the general revenue out of the fund. Such defaulters are to remain liable and amounts recovered from them are to be paid into the general revenue, which thereupon is to recoup the fund *pro tanto*. Provisions are made for the administration of the fund and the refund of contributions, subject to liabilities incurred, upon retirement from the public service or death of contributors.

Criminal Law (No. 8).—The Criminal Code Amendment Ordinance, 1909, is consolidated with the Criminal Code of the Colony, which it amends by providing that sentence of death is not to be pronounced against a child or young person, who is to be sentenced to detention during his Majesty's pleasure, and, being so sentenced, imprisoned accordingly.

Civil Procedure (No. 11).—By the Code of Civil Procedure Amendment Ordinance, 1909, appeals are to lie to his Majesty in Council, and such amendment is to be substituted as Art. 967 of the Code.

Plants Protection (No. 12).—The Plants Protection Ordinance, 1909, applies to growing plants, cuttings, buds and grafts, bulbs, roots, seeds and berries, and fruit and vegetables intended for propagation and not for consumption. Importation of plants likely to introduce plant disease may be prohibited by Proclamation, and the importation of all plants is subject to the provisions of the Ordinance.

(iii) ST. VINCENT.

[*Contributed by* WALLWYN P. B. SHEPHEARD, ESQ.]

Ordinances passed—16.¹

Marriage (No. 3).—The Marriage Ordinance, 1909, consolidates and amends the law relating to marriage. Marriage either past or future with a deceased wife's sister is not to be deemed void as a civil contract by reason only of such affinity provided that such a past marriage, annulled or in which during the life of one party the other has lawfully married, shall be void upon and after the day of its annulment or the marriage of one of the parties during the life of the other, and that no rights as to property accrued before this Ordinance are to be prejudicially affected nor any will be deemed revoked by any past marriage being made valid by the Ordinance. The Ordinance contains in fifty-six sections and several schedules of forms detailed provisions as to marriage officers both civil and religious, preliminaries to solemnisation of marriage, prohibition of marriage of persons in certain cases,

¹ Ordinances are passed by the Governor with the advice and consent of the Legislative Council of St. Vincent.

solemnisation of marriage, marriage *in articulo mortis*, and administration of the Marriage and Registration Law.

Registration of Births and Deaths (No. 4).—The Registration of Births and Deaths Ordinance, 1909, consists of fifty-nine sections and several schedules of forms. It is divided into the following parts :

Part I.—Central Administration under the Registrar-General.

Part II.—Registration Districts.

Part III.—Registration of Births and Deaths.

Part IV.—Returns, etc., and Certified Copies of Registers.

Part V.—Offences and Procedure.

Criminal Law (No. 7).—The Offences against the Person Amendment Ordinance, 1909, is consolidated with like Ordinances of 1878 and 1889, and is in effect similar to the foregoing St. Lucia Ordinance, No. 8, 1909.

Registration of Deeds (No. 8).—The Registry Ordinance, 1883, Amendment Ordinance, 1909, is consolidated with and amends the principal Ordinance in respect of the registration of documents (other than wills) when executed in any part of the British Dominions out of the Colony of St. Vincent by requiring them to be proved by declaration in writing of attesting witness as to due execution made before a notary or judge or Governor or mayor or chief magistrate of the place where such declaration is made. Any deeds, etc., not required by principal Ordinance to be registered may at the option of any party thereto be registered.

Companies (No. 13).—The Companies Act, 1874, Amending Ordinance, 1909, is consolidated with and amends the principal Act by prohibiting use of names implying Royal patronage similar in effect to the Ordinance No. 4, St. Lucia, above noted.

Agricultural Products (No. 16).—The Agricultural Products Protection Ordinance, 1909, is consolidated with and amends the principal Ordinance, 1906, by making the growth and ginning of cotton, its sale, etc., subject to the provisions contained in the Ordinance.

8. THE LEEWARD ISLANDS.

[Contributed by T. S. SIDNEY, ESQ., *Attorney-General*.]

THE FEDERAL COLONY.

Acts passed—9.

Quarantine (No. 1).—An Act amending No. 5 of 1905, giving effect to recommendations of the recent Conference for the West Indies.

Marriages (No. 2).—Marriages may now be solemnised between the hours of 6 a.m. and 8 p.m.

Children's Charter (No. 3).—By this Act sentence of death shall not be pronounced on any person under the age of fifteen years.

Magistrates' Code of Procedure (No. 4).—The amendments in the

principal Act dealt with s. 91 in view of a recent judicial decision, and the repeal of ss. 132 and 133 dealing with magisterial returns.

Jury Laws (No. 5).—Owing to an unexpected judicial interpretation of the meaning of one of the sections of this Act, it was disallowed.

Supreme Court Library (No. 6).—Repealing the Act of 1878 constituting a Supreme Court Library.

Admission of Barristers (No. 7).—To amend the Supreme Court Act, 1880, by imposing a fee of £20 on admission to practice before the Supreme Court.

(i) ANTIGUA.

Number of Ordinances—5.

Porters and Watermen (No. 3).—This is an Ordinance for the regulation of porters and watermen and the licensing of lighters and boats plying about the Island.

Wakes (No. 4).—Wakes or gatherings of persons in respect of deceased persons and accompanied by noise and singing have made this Ordinance necessary. It prohibits such wakes being continued later than 11 o'clock at night, and gives special powers to the police.

Security by Newspapers (No. 5).—No newspaper is, henceforth to be printed or published until a bond for £200 with sureties has been given to answer any penalty which may be imposed for printing or publishing a blasphemous or seditious or other libel. This is a useful safeguard against the licence of those *ephemeride* of the press that are born and die in a day.

Supply (No. 1).

Gun (No. 2).—Definition of, extended.

(ii) DOMINICA.

Number of Ordinances—5.

Security by Newspapers (No. 3).—This is an Ordinance analogous to No. 2 of Montserrat and No. 5 of Antigua, requiring a bond with sureties by newspapers to answer possible penalties for libel.

Medical Relief (No. 5).—The Ordinance of 1880 on the subject is amended.

Supply (Nos. 1, 2 and 4).

(iii) MONTSERRAT.

Number of Ordinances—5.

Newspaper Security (No. 2).—This is an Ordinance on the same lines as No. 5 of Antigua (*supra*) requiring a bond by newspapers to answer penalties for libel.

Public Roads.—No. 3 amends the Ordinance of 1907.

Supply (Nos. 1 and 5).

(iv) ST. CHRISTOPHER AND NEVIS.

Number of Ordinances—6.

Savings Bank (No. 2).—This Ordinance establishes a Savings Bank for the Presidency with the necessary regulations.

Security by Newspapers (No. 3).—This is legislation similar to that of Antigua, Montserrat, and Dominica.

Explosives (No. 4).—Strict regulations are made as to the landing, testing, and storing of explosives, petroleum in particular, which is given a wide definition.

Legislative Council (No. 5).—The duration of the Legislative Council is reduced to three years.

Supply (Nos. 1 and 6).

(v) THE VIRGIN ISLANDS.

Number of Ordinances—5.

Roads (No. 2).—A road tax is established and road wardens appointed for the maintenance of public highways.

Security by Newspapers (No. 3).—This Ordinance is similar to those already noticed.

Supply (Nos. 1 and 4).

XI. MEDITERRANEAN COLONIES.

I. GIBRALTAR.

[*Contributed by* ALBERT GRAY, ESQ., K.C.]

Ordinances passed—9.

Merchant Shipping.—S. 50 of the Merchant Shipping Act, 1894, which relates to the detention of foreign ships, is made to apply to any ship which is unsafe by reason of the defective condition of her hull, equipments, or machinery; and the provision is to apply to any foreign ships in the port of Gibraltar whether they take in cargo there or not (No. 3).

The provisions of ss. 452, 454, and 455 of the Act of 1894 are also applied to foreign ships carrying grain cargoes while in the port of Gibraltar.

Wireless Telegraphy.—Wireless telegraphy on ships in the port of Gibraltar, whether British or foreign, must be worked in accordance with rules made by the Governor (No. 4).

Married Women.—A married woman having separate property is to be subject to the same liability for the maintenance of her parents as if she were a feme sole (No. 5).

Death Penalty.—Death sentences on young persons, under sixteen years, are abolished (No. 6).

Incest.—Punishments in the case of incest are provided for in accordance with the recent U.K. Act (No. 7).

Distress.—Protection is given to under-tenants in the case of distresses levied by landlords in respect of arrears of rent of the tenant (No. 8).

2. MALTA.

[*Contributed by* ALBERT GRAY, ESQ., K.C.]

Ordinances passed—10.

Criminal Law.—A number of amendments of the Criminal Law are made by No. 8.

Where a “contravention” is committed by a person who is under the care or authority of another, if it is the duty of that other person to prevent the contravention, and he could have done so with diligence, he also is liable to punishment.

Adultery is a criminal offence in Malta, but extenuating circumstances are now recognised. The term of imprisonment is not to exceed three months if the complaining husband has misconducted himself notoriously within the past five years, or if the husband and wife are judicially separated “by reason of the fault of the complaining consort.”

A considerable number of the amendments are for the further protection of women and girls, and follow the recent legislation of this country.

Provision is made for the evidence of prisoners.

Of the other Ordinances, four are concerned with finance, and two are private Acts.

3. CYPRUS.

[*Contributed by* STANLEY FISHER, ESQ., *President of the District Court of Kyrenia.*]

1908.

Laws passed—10.

Death Penalty Amendment.—No. 2 abolishes the penalty of death in cases of offences against Arts. 59, 69 (offences of a mutinous or insurrectionary nature), 61 (setting fire to or destroying Government buildings or stores), and 163 (setting fire to buildings or ships) of the Ottoman Penal Code, and substitutes a penalty of hard labour for life or for a shorter term.

Village Obligations Amendment.—No. 5 amends the Village Obligations Law, 1901,¹ and makes better provision for ensuring that persons who are resident in or have a stake in a village shall contribute their fair share towards the cost of works undertaken for the benefit of the village generally. Steps must be taken to ascertain the view of the village as to any work proposed to be carried out under this Law, and provision is made, by means of an appeal to the District Commissioner, that the assessments, which are made in the first instance by the Mukhtar and Village Commission, are fair and reasonable. Unpaid assessments are ultimately recoverable under the Tithe and Tax Collection Law, 1882.

Platres: Public Health.—No. 6 provides for the constitution and regulation of a body to control and safeguard, during the summer months, the sanitation and public health of Platres, a village on the southern slope of Mount Troodos much resorted to in summer by visitors from other parts of Cyprus, and from Egypt.

Foreign Tribunal Evidence.—No. 7 makes provisions for taking evidence in Cyprus in civil and criminal cases (not being of a political character) pending in the Courts of other countries. The Supreme Court nominates the person before whom the evidence is to be taken, and the evidence will be sent by the Registrar of the Supreme Court to the Chief Secretary to Government for transmission through the Secretary of State to the Court requiring it.

Archiepiscopal Election.—No. 8 was passed to put an end to difficulties arising from a long-existing vacancy in the Archiepiscopal Throne of the Church of Cyprus. It provided machinery for holding an election, and having effected its object it ceased to be in force except in so far as rights, powers, and privileges arising from it are concerned.

Corporate Bodies (Immovable Property Registration).—No. 9 enables duly constituted non-ecclesiastical corporate bodies to hold and deal with immovable property as if they were individuals. An annual fee is payable in respect of property registered under this Law in lieu of the fee payable on devolution by inheritance in the case of property registered in the name of an individual.

Sunday Observance (Greek Orthodox).—No. 10 repeals and substantially re-enacts, with a small alteration as to hours, a similarly intitled Law passed in 1907.²

1909.

Laws passed—16.

Steam Engines (Fuel).—No. 3 continues Law 6 of 1906,³ which was passed in the interest of forestry, in force for three years from July 1, 1909.

¹ Journal, N.S. vol iv. p. 358.

² Journal, N.S. vol. ix. p. 532.

³ Journal N S vol. viii. p. 429.

Death Penalty (Children) Amendment (No. 4).—"Children" are defined as persons under fourteen, and "young persons" as persons between fourteen and sixteen. Neither children nor young persons are to be sentenced to death, nor whatever capital offence they may commit are they to be liable to a greater punishment than detention for ten years.

Motor Car.—No. 5 provides for the better regulation of motor traffic by giving the High Commissioner in Council power to make regulations with regard to registration, licensing, closing of certain roads to motor traffic, speed, etc. The Law provides a penalty for infringement of the regulations not exceeding a fine of £10 for a first offence, and a fine of £25 or one month's imprisonment for a subsequent offence.

Vehicles and Traffic Regulation Amendment.—No. 6 amends the Vehicles and Traffic Law, 1907,¹ by cancelling the offence of loitering in a public street.

Game and Wild Birds Protection Amendment.—No. 7 amends the Game and Wild Birds Protection Law, 1906. The shooting of all game and wild birds between March 1 and August 12 is absolutely prohibited, and offenders are punishable by a fine not exceeding £5, forfeiture of licence, and prohibition from carrying a gun for twelve months after conviction. The High Commissioner in Council is empowered to reserve areas for the preservation of game for periods not exceeding two years, provided that no single area must exceed 50 square miles, nor must the aggregate of areas reserved in one district exceed one-third of the total area of the district. More drastic provision is also made for preventing the taking of the eggs of game and wild birds, and certain birds peculiar to Cyprus, eight in number, are protected all the year round.

Fish Preservation (No. 11).—This is the first Law of its kind passed in Cyprus. Its operation is confined to waters connected with Public Irrigation Works in the district of Famagusta. It provides penalties for punishing persons who fish in such waters.

Field Watchmen Amendment.—No. 14 substantially amends the Field Watchmen Law, 1896, by placing all field watchmen under the supervision of a member of the Cyprus Military Police specially appointed in each Nahieh for the purpose. This functionary's duties include also the prosecution of claims for damage done by trespassing flocks. Better provision is also made for assessing the contribution of villagers to the amount required for paying the wages of field watchmen.

Cruelty to Animals.—No. 15 repeals the Cruelty to Animals Law, 1890, much of which it re-enacts. It also increases the number of animals protected against cruelty, and gives power to the High Commissioner in Council to make regulations with a view to ensuring the humane treatment of animals while being embarked, disembarked, and while on a voyage, without, however, providing for any penalty for breach of the regulations.

¹ Journal, N.S. vol. ix. p. 533.

Fines inflicted under the provisions of this Law (subject to any reward, not exceeding one-half the fine, ordered by the Court to be paid to an informer) are to be paid to the Committee of the Cyprus Branch of the Royal Society for the Prevention of Cruelty to Animals to be expended in furtherance of their aims.

Malicious Injury to Property Amendment.—No. 16 amends the Malicious Injury to Property Law, 1894. The category of property to which the Law is applicable is extended, and provision is made for facilitating the settlement of claims under the Law by agreement between the person aggrieved and the village community affected so as to obviate the expense involved in a petition to the Court. Provision is also made that persons who fail to pay their share of compensation may be ordered to work on the village roads, and on refusal to do so may be imprisoned for a term not exceeding one month.

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NOTES.

Comparative Law in Blue-Books.

Bills of Exchange.

THE blue-book (Cd. 5224, His Majesty's Stationery Office, 1s. 3d.) containing the correspondence relating to the Conference on Bills of Exchange at The Hague in June 1910 consists not so much of a statement of the law as it is, but rather as it is desired to make it throughout the world. A draft uniform law which has been unanimously accepted by the delegates of more than thirty nations, many of them invested with plenary powers, deserves the most careful consideration from the English mercantile community. On the whole the uniform law approaches English law more nearly than any existing continental code. The points of difference between English law and the proposed uniform law are numerous; some of them are unimportant, while others are of the highest importance as affecting bills which circulate from country to country. From the point of view of the student of comparative legislation the points of difference are of particular interest. The blue-book contains a memorandum by Sir M. D. Chalmers and Mr. F. H. Jackson in which they have set out a translation of the uniform law, employing as far as possible the language of the English Act, and in a parallel column have inserted against each article of the uniform law the corresponding provisions of the Bills of Exchange Act, 1882, or where there is no corresponding provision, a brief explanatory note. The comparative statement is illustrated by observations upon the distinctions between the English Act and the proposed uniform law.

Commercial Travellers.

A new edition (Cd. 5189, His Majesty's Stationery Office, 8d.) of a blue-book published in 1906 has been laid before Parliament. It contains a memorandum compiled with the object of showing in a summary form the regulations applicable to British commercial travellers in British India, British self-governing dominions, the Crown colonies and protectorates, and in the principal foreign countries. It also states the special taxes to which commercial travellers are liable, and the Customs treatment accorded to samples brought by them.

Customs.

A revised edition (Cd. 5347, His Majesty's Stationery Office, 4½*d.*) has been published of another memorandum of a similar character to the preceding. It was last issued in 1903. The object is to show in a concise form the regulations in force in all parts of the British Empire and in foreign countries in regard to the production of certificates of origin for imported goods other than sugar, the certification of invoices, etc.

Elections.

In addition to the statements already mentioned¹ the Royal Commission on Electoral Systems received oral evidence (Cd. 5352, His Majesty's Stationery Office, 1*s.* 8*d.*) which included some interesting information as to the law and practice in foreign countries. Senator Count Goblet d'Alviella gave an account of the fight for proportional representation in Belgium which lasted from 1865 to 1900 and explained the results of its working. M. Etienne Flandin, member of the French Senate, described the system of proportional representation recommended by the Commission der Suffrage Universel for adoption in the French Parliament. Dr. Hachett from Western Australia described an election there from his personal knowledge under a system of preferential voting.

British Companies in Egypt.—A correspondent writes :

"A very serious situation, it appears from the *Egyptian Gazette*, has been created in Egypt by the attitude of the Mixed Courts there towards English companies. Briefly stated, it comes to this, that an English company which is carrying on business in Egypt may be treated by a Mixed Court as 'null and non-existent' there, and its books and assets ordered to be handed over to the liquidators of the Mixed Court. This is what recently happened in the case of the Helouan (Egypt) Development Co., Limited. The company was registered in England under the Companies Acts, 1862-1900, and carried on business in Egypt ; but it was paralysed and driven into voluntary liquidation by the doctrine of the Mixed Court, enunciated a year or two ago in the City and Agricultural Land Co., Limited, which made it 'null and non-existent.' Thereupon the Mixed Court ordered the liquidator who had been chosen by the shareholders to transfer the books and assets of the company to liquidators appointed by the Mixed Court. A shareholder of the company applied to the Supreme British Consular Court to restrain the liquidator from acting on this order, and the Judge—Cator J.—granted an injunction on the ground that the order was without jurisdiction—as involving a question of 'statut personnel'—and there the matter stands.

"Let us look at it for a moment on general principles. The status of an ordinary person depends on the law of the country of his domicile—the law,

¹ See Journal, N.S. vol. xi. p. 196.

that is, which he has, by fixing his permanent home or residence there, elected to be governed by; and the principle is equally applicable to a company, which is a legal *persona* independent of the members who make up the company. Suppose then that a company with an English domicile wishes to trade abroad. In strict law, as an artificial person, it has no existence outside the territories of the sovereignty which created it; but its existence may be recognised by the law of the country to which it goes to trade, and usually is so recognised on grounds of international comity. In the absence of an express prohibition, foreign companies are generally permitted by the law of civilised nations to sue, to make contracts, and to hold land like domestic citizens or companies. But they may be excluded even as are undesirable aliens, or put on terms, *e.g.* they may be required to give security for the performance of their contracts, or to pay a tax for the permit to trade, or to file documents showing their constitution.

“In any of these ways and many more the country to which a foreign company goes to trade may protect itself, and if Egypt had chosen to adopt this course and close the country to all English companies, or to all English companies not fulfilling certain conditions, it would only have been acting within its strict rights. But this is what it has not done. It has accorded recognition to English companies, and now that the methods of some of these companies have met with the disapproval of the Mixed Courts, those Mixed Courts have assumed jurisdiction to declare such companies ‘null and non-existent.’ It is clear that this is wrong, and for two reasons. Recognition once granted, expressly or tacitly, is a recognition of the company as a legal *persona*, and it cannot afterwards be treated by a Mixed Court as dissolved automatically. In the next place, matters involving ‘statut personnel’ are expressly withdrawn from the cognisance of the Mixed Courts, and the status of an English company doing business in Egypt is unquestionably a matter of ‘statut personnel’ within Art. 9 of the Règlement d’Organisation Judiciaire, and Art. 4 of the Mixed Civil Code. This was the view taken by Cator J., and it is entirely in accordance with the authorities on the subject. If the Egyptian Government desires to protect itself against fraudulent companies emanating from England, it can easily do so by exacting guarantees as to solvency or respectability before admitting them to carry on business in Egypt.”

A Soldier's Will.—From the time of the Roman law the soldier *in expeditione* has been a “privileged person” in respect of will-making. In England, before the passing of the Statute of Frauds, a nuncupative will—that is, a verbal statement by a testator of his wishes before witnesses—might be made both by civilians and soldiers. Such wills naturally led to great abuses; but when the power was taken away from civilians it was allowed to remain in the case of soldiers, and now, by the Wills Act “any soldier being in actual military service . . . may dispose of his personal estate as he might have done before the coming into operation of this Act.” It makes

no difference that he has not attained the age of twenty-one. New South Wales has an Act in similar terms, and the question has recently been raised as to the meaning of "actual military service" (*In re Thompson*). The soldier-testator in question had received a commission in a volunteer regiment, and had gone into residence at the barracks. Subsequently a camp was formed, and the testator was drafted into it among others desirous of going to South Africa to serve under the Imperial Government in the Boer War. On March 19, 1901, he received orders to embark for South Africa, and on the 21st he embarked. The will in question was made between these two dates—on March 20. On these facts, Mr. Justice Street held that the testator was in "actual military service" at the date of his will. The true test, he held, is whether before the will was made the soldier has taken some step, under orders, in view of, and preparatory to joining the forces in the field, and here he had by going into camp for embarkation. This is substantially the same view as that taken by Sir Francis Jeune, on the construction of the English Wills Act, in *In the Goods of Hiscock*, [1901] P. 78.

The "Jahrbuch des Oeffentlichen Rechts."—Among the many interesting articles in the latest volume of the *Jahrbuch des Oeffentlichen Rechts* is one by Prof. Ullmann on "Die Fortbildung des Seekriegsrecht" by the Declaration of London: a careful study of the provisions and effects of that instrument, with a no less careful abstinence from any precise appreciation of its value. Prof. Huber of Zurich contributes a suggestive and elaborate paper entitled "Beiträge zur Kenntnis der soziologischen Grundlagen der Völkerrecht und Staatengesellschaft," one of the many signs that great changes in regard to the foundations of international law are in progress. The Review of Legislation of the various parts of the German Empire will give to many readers a new idea of the extent and variety of the legislation in Saxony and Bavaria.

Burge's "Colonial and Foreign Law: Marriage."—It is significant of the growing importance of marriage problems that out of the six volumes which are to make up the second edition of Burge's *Colonial and Foreign Law*, the whole of this bulky third volume is devoted to Marriage. Besides the learned editors—Mr. Justice Renton and Mr. G. G. Phillimore—sixteen experts in foreign and colonial law have been called in aid, and the law of nearly every civilised nation in the world is passed in review. Such a survey is a most valuable contribution to the comparative law of the subject. One thing emerges from it quite clearly—marriage can never be a merely consensual contract. The State is too deeply concerned with the sanctity of family life—"the highest and best school," as Cardinal Manning called it—to leave marriage to the caprice of the individual spouses, to be made a mere temporary union and relaxed or dissolved at will. All systems of law are at one in emphasising the importance of maintaining marriage inviolable as far as possible: not only on the sacramental theory, but for good practical reasons. In the present volume we have collected the grounds of divorce among

the nations. Varied as they are in detail, they have this in common, that they are offences of a kind which make the married life intolerable or defeat the ends for which it was ordained. If there be overmuch rigour, many may decline altogether, it has been thought, to take the risk of marriage at such a price—like the learned Selden who calls marriage a “desperate thing.” “The frogs in Æsop,” he says, “were extreme wise. They had a great mind to some water, but they would not leap into the well, because they could not get out again.”

The Coming Imperial Conference.—Interest in the approaching Imperial Conference will be quickened by the publication of the agenda, which has recently appeared as a White Paper. The subjects are many and various, but they are best summarised in a dispatch of the Secretary of State for the Colonies to the Governors-General and Governors of Canada, Australia, New Zealand, South Africa, and Newfoundland. It runs as follows :

1. As at present advised His Majesty's Government propose to suggest for discussion at the Conference the following subjects :

- The position of British Indians in the Dominions ;
- Labour Exchanges in relation to the Dominions ;
- Uniform design for stamps ;
- The arrangements for expulsion of undesirable aliens.

2. In my telegram of December 19 I made certain observations as to the method in which the suggested subjects might be dealt with at the Conference. It may, however, be useful that, following the precedent set by Lord Elgin in his dispatch of January 4, 1907, I should summarise the subjects brought forward, and group them with a view to a statement of the agenda of the Conference. This must be provisional for the present, in order to leave room for the eventuality of additional subjects being proposed by the Dominion of Canada, the Union of South Africa, and by His Majesty's Government themselves.

3. It is proposed that the Conference should open on Monday, May 22, and it will probably be convenient that its proceedings should, if possible, conclude before the date of the Coronation, that is, Thursday, June 22. This will afford a period of four clear weeks for purposes of discussion. In 1907 the proceedings of the Colonial Conference occupied four weeks, *i.e.* from April 15 to May 14. The Conference then met on fifteen days, and I apprehend that the conditions as regards facilities for meeting will be much the same on the present occasion. It would appear, therefore, that there should be room for not less than fifteen meetings during the period available before June 22. In 1907 there was a separate discussion at the Treasury respecting certain subjects in which their Lordships had a special interest. These subjects were, however, brought up again at the main Conference.

4. The principle laid down by Lord Elgin in his dispatch of January 4, 1907, was to give preference to subjects proposed by the Dominions and to rank such subjects according to the number of Dominions proposing them, regard, of course being had to the intrinsic importance of the subjects and to the possibility of arriving at a definite result by discussion. I apprehend that these principles may again be followed with advantage ; and accordingly the subjects put forward by the Commonwealth of Australia, the Dominion of New Zealand, and Newfoundland may be taken provisionally as the basis for the agenda.

5. Two Dominions propose what are either the same subject or branches of the same subject, viz. —

- | | | | |
|-----------------------------------------------------|---|------------------------|-----------------------------------------------|
| (a) Merchant Shipping and Navigation Laws. | { | New Zealand (13). | |
| | | Australia (3). | |
| (b) All Red Route | { | New Zealand (10). | |
| | | Newfoundland. | |
| (c) Uniformity of various Laws | { | New Zealand (12). | |
| | | Australia (4) and (5). | |
| (d) Imperial Court of Appeal | { | New Zealand (11). | |
| | | Australia (11). | |
| (e) State-owned Atlantic Cable | { | New Zealand (6). | { (Also State - owned
line across Canada.) |
| | | Australia (6). | |
| (f) Reciprocal legislation as regards
Conspiracy | { | Australia (9). | |
| And as regards Destitute
Persons | { | New Zealand (12). | |

The following subjects are proposed by one Dominion :

New Zealand :

Publicity of proceedings except as to confidential matters ;
Imperial representation of oversea Dominions ;
Reconstruction of the Colonial Office ;
Interchange of Civil Servants ;
Universal penny postage ;
Cheapening of cable rates ;
Imperial wireless telegraph system ;
Double Income Tax and Stamp Duty on Colonial Bonds.

Australia :

Commercial relations generally and in respect of British shipping ;
Declaration of London ;
Emigration ;
Currency and coinage ;
Co-operation between the naval and military forces of the Empire and the status of Dominion navies.

6. In my dispatch of January 12 I have expressed some doubt whether uniformity in the matter of Patent Law can be usefully discussed on the present occasion ; but it will clearly be necessary that there should be some consideration of the question whether further uniformity in legislation can be obtained in the matters dealt with under head (c) above, and whether reciprocity in legislation can be arranged under head (f). The resolution of the Commonwealth of Australia as to naturalisation leads me to observe that this question of uniformity of law is essentially a technical question, and as such may more properly be remitted to a Committee of the full Conference sitting as a subsidiary Conference. His Majesty's Government have expressed the hope that your Prime Minister may be accompanied by other members of the Ministry ; and it is reasonable to anticipate that these Ministers may include among them those within whose province the question of uniformity of laws in the matters indicated properly falls. There are certain other subjects which also lend themselves to treatment, if necessary, by the method of subsidiary Conferences ; for example, the question

as to undesirable aliens and the postal subject suggested by His Majesty's Government.

7. There would remain for the consideration of the full Conference the following matters :

- Merchant Shipping and Navigation Laws ;
- Cheaper cable rates ;
- All Red Route ;
- Imperial Court of Appeal ;
- State-owned Atlantic Cable and Telegraph line across Canada ;
- Publicity of Proceedings ;
- Imperial Representation ;
- The reconstruction of the Colonial Office ;
- Interchange of Civil Servants ;
- State-owned British Wireless Telegraph Stations ;
- Double Taxation, and Stamp Duties on Colonial Bonds ;
- Commercial Co-operation for the encouragement of British Manufactures and Shipping.
- The Declaration of London ;
- Emigration and the position of Labour Exchanges ;
- Currency and Coinage ;
- Co-operation between the naval and military forces of the Empire and the status of Dominion navies ;
- The position of British Indians in the Dominions.

8. The subjects above set forth as a basis for agenda of the Conference are of varying importance, but it seems clear that there must come first the question of the publicity of the proceedings of the Conference and the resolutions of New Zealand on the subject of Imperial representation, the reconstruction of the Colonial Office, and the interchange of Civil Servants, which have relation to the constitution of the Conference itself. There might follow the subjects proposed by two Dominions, viz.—

- Merchant Shipping and Navigation Laws ;
- The All Red Route ;
- The Imperial Court of Appeal ;
- The State-owned Atlantic Cable and line across Canada.

Amongst the remaining subjects proposed by one Dominion or by His Majesty's Government a greater measure of importance appears to attach to the subjects of co-operation between the naval and military forces of the Empire and the status of Dominion navies, the position of British Indians, co-operation in commercial matters, and the support of British trade and shipping, emigration, the Declaration of London, State-owned wireless telegraph rates, and the cheapening of cable rates. These subjects might accordingly have the next place on the agenda, which would be completed, should time allow, by the inclusion of the subjects of universal penny postage, coinage and currency, and double taxation and stamp duties on colonial bonds.

I have, etc.,
L. HARCOURT.

“**American International Law.**”—We have received a copy of Dr. Alvarez's book entitled *Le Droit International Américain*, in which he

seeks to prove that there is such a form of international law, and to lay down its principles and to distinguish it from international law generally. Dr. Alvarez goes so far as to maintain that there is, or will be, a special international law for Asia and for Africa. One sentence will show the basis of his argument: "L'Asie et l'Afrique, n'étant pas composées uniquement d'États indépendants, et n'ayant pas à leur base une doctrine de Monroe, il s'ensuit que le droit international n'est pas, comme en Amérique, l'expression de la volonté des États. En Afrique elle dérive des accords des États de l'Europe, notamment de la Conférence de Berlin de 1885, de la Conférence de Bruxelles de 1890, et aussi des règles spéciales qu'ils édictent pour leurs possessions africaines."

International Association of Advocates.—We have received a copy of the *Zeitschrift des Internationalen Anwalt-Verbandes*, an association which has existed for seven years, and which is intended to promote "solidarity" between the Bars of all countries and to elevate their position. Among the valuable articles perhaps the most interesting is that by Dr. Simon Messinger of Buda-Pest, who points out and discusses the many common interests of barristers in all countries. From an article discussing the well-worn theme of the morality of advocacy, it appears that in Germany, as with us, there is wild talk on the subject. The writer quotes a censor of the profession, who says that if he had to choose whether his son was to be a "Rechtsanwalt" or a criminal, he would prefer him to be the latter. The *Zeitschrift* contains much interesting information as to legal matters, particularly such as affect the Bar in many countries.

Unworthy Heirs in Roman-Dutch Law.—There is a whole chapter of Roman-Dutch law on "unworthy heirs" to which our English law is, speaking generally, a stranger. Any bequest, for instance, by an adulterer to an adulteress or *vice versa* is prohibited by Roman-Dutch law, the ground, of course, being that any influence that a woman may possess over a man living in a state of adultery should not be used to the prejudice of those who are related to him by blood or otherwise, and therefore reasonably entitled to succeed. Children procreated in adultery or incest may not take or inherit from their parents. The case of natural children is different; they may succeed. Persons who have married under the legal age without the consent of father, mother, or guardian are under the same disability. Nor can persons who have contracted a clandestine marriage or eloped together benefit one another. Public policy in these cases imposes the disability to protect the legitimate heirs and to discourage illicit intercourse. No one, again, who has helped to kill another or has given counsel or assistance for the purpose can inherit any property from such other by testament, or profit by his own wrongdoing. Here English law is at one with Roman-Dutch. In a recent case in the Supreme Court of Natal—*Ramalutclumil v. Estate Ramiah*—an Indian who had come with his wife and child to live in Natal took a woman to live with him in adultery, and on his death left her all his property.

The property was claimed by the child, and her claim allowed by the Court on the ground that she was *indigna*. It was urged that she was a concubine lawfully taken under Indian law, and that the Indian view of concubinage differs widely from Western ideas on the subject; that Pothier, while classing a prostitute as *indigna*, distinguishes a concubine; but the Court held that there was but one law in Natal in this matter for European and Indian alike. The Indian coming to the Colony takes the law as he finds it. This seems right. It might lead to a lamentable confusion of morals if the Court were once to recognise the status of concubinage.

